

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

LOUISIANA MUNICIPAL POLICE)
EMPLOYEE'S RETIREMENT SYSTEM)
VS) CASE NO: 2:11-CV-289
GREEN MOUNTAIN COFFEE ROASTERS,)
INC., ET AL)
_____) MOTIONS TO DISMISS HEARING

BEFORE: HONORABLE WILLIAM K. SESSIONS, III
DISTRICT JUDGE

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(Appearances Continued)

DATE: December 12, 2013

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1
2 (The Court opened at 1:30 p.m.)

3 THE CLERK: This is Case Number 11-289, Louisiana
4 Municipal Police Employees' Retirement System versus Green
5 Mountain Coffee Roasters. Present in the courtroom on
6 behalf of the plaintiffs are Attorneys Mark Rosen, Michael
7 Yarnoff, John Browne, Pietro Lynn. Also present on behalf
8 of the defendant are Anne Palmer, Mark Vaughn, Matthew
9 Borick, Randall Bodner, Robert Luce and Matthew Byrne. The
10 matter before the Court is a hearing on the motions to
11 dismiss.

12 THE COURT: There have been motions to dismiss
13 filed in regard to all of the defendants. And whose going
14 to argue on behalf of the defendants?

15 MR. BODNER: I'll argue on behalf of Green
16 Mountain, Your Honor.

17 MR. BYRNE: And I'm arguing on behalf of Miss
18 Rathke and Mr. Blanford.

19 MR. BODNER: And we had conferred before Your
20 Honor I'll take the labor in the argument --

21 THE COURT: Okay.

22 MR. ROSEN: -- in terms of any allocation of time.

23 THE COURT: All right.

24 MR. BODNER: May it please the Court, as Your
25 Honor is well aware this is the second of three lawsuits

1 against Green Mountain Coffee Roasters over a relatively
2 short period of time with sequential class periods. And
3 while this is the second --

4 THE COURT: This is chronologically the second.

5 MR. BODNER: This is chronologically --

6 THE COURT: It's the third in fact that have been
7 filed.

8 MR. BODNER: You are ahead of me, Your Honor.
9 That's exactly right. Chronologically the second. Argument
10 had to be delayed frankly for my own. And thank you for
11 that.

12 THE COURT: Sure.

13 MR. BODNER: Things are fine. But chronologically
14 in the second, but the third in terms of its disposition
15 because as this Court is well aware the other two have been
16 dismissed. And, in fact, we submit both in our briefs and
17 we'll argue today that this third, like the other two,
18 should be dismissed for very much the same reasons that this
19 Court has applied to the other two cases.

20 And indeed because Your Honor --

21 THE COURT: Knowing full well that the other two
22 cases are now before the U.S. Court of Appeals in New York.

23 MR. BODNER: Only half right, Your Honor.

24 THE COURT: Oh, really?

25 MR. BODNER: In fact, the Horowitz, the Warchol

1 case the plaintiffs withdrew their appeal and that case is
2 dead, buried and gone.

3 THE COURT: Oh, really?

4 MR. BODNER: And the third action, which I think
5 of as the Fifield action --

6 THE COURT: Did they ever send in a note saying
7 that I did a great job in granting the dismissed motion?

8 MR. BODNER: We just read, we just read the
9 appellate's brief last night, Your Honor. And my impression
10 is I think you did a great job.

11 THE COURT: I'm sure that you do in light of the
12 fact that you'll be relying both on Fifield and Horowitz,
13 but I appreciate that.

14 MR. BODNER: But at any rate, Your Honor, so
15 anyways I'll dispense with, you know, unlike we did the last
16 time walking through Tellabs, Novak, Your Honor is quite an
17 expert at it and that will dispense with the preliminaries.

18 What I would like to do though for this case is to
19 step back a little bit. And before we get into some of the
20 details of the non-detailed conclusory allegations I would
21 like to put before the Court just to set the stage the
22 inferences that the plaintiff would have this Court believe
23 and which we submit are far from cogent and compelling under
24 the Tellabs standard.

25 Essentially the plaintiff's claim that for the

1 first three quarters of fiscal 2011 the defendants, Green
2 Mountain and the two individual defendants, attempted to
3 perpetrate what, and these are using their words, a
4 fraudulent growth story, but that that false story of growth
5 came crashing down, the truth was magically revealed in the
6 fourth quarter of 2011.

7 Now that's a strange theory, Your Honor, because
8 how can the defendants be liable for fraud, for a false
9 growth story when by the plaintiff's own admission Green
10 Mountain Coffee Roasters, Green Mountain's net sales grew
11 year over year by 91 percent in the very quarter in which
12 the plaintiff's claim that this false story of growth was
13 revealed.

14 THE COURT: Well, but their expectation was in
15 that fourth quarter that the growth would be somewhere in
16 the vicinity of 110 percent.

17 MR. BODNER: No, Your Honor, actually, the
18 guidance and, again, their claim is not so much forward
19 looking statements, they are not claiming, because then you
20 would be hearing arguments about the safe harbor that this
21 Court is very well aware from the Golaskorski case.

22 They are talking about historical false
23 statements, not false forward looking statements. And if
24 they are, we'll talk about the PSLRA's safe harbor provision
25 that this Court is very well aware of, because it was the

1 basis of the --

2 THE COURT: No, I mean their, I appreciate the
3 fact that they are not relying upon the fact that there was
4 supposed to be 110 percent growth, it was only 91 percent
5 growth. They are using that as an example, as I understand
6 their pleadings, to say that there was this plan in place
7 over the first, second, third quarter, going into the fourth
8 quarter, to begin to expand inventory, to make sure that
9 there is a growth going, their production levels increased,
10 their obsolescence levels increased and as a result they
11 could show to the marketplace that this, in fact, is a
12 company which continues to grow as evidenced by their
13 production figures. I assume that that's right. That's
14 their scheme.

15 MR. BODNER: Well, that's the alleged scheme. My
16 only point, Your Honor, and then we'll get to the rest of
17 their theory, is that it is still odd nonetheless to say
18 that this was a false growth story when the very quarter in
19 which the truth was supposedly revealed growth was 91
20 percent year over year.

21 And indeed, and the plaintiffs are quick to
22 support the idea that you can talk about post-class things
23 where events, were they irrelevant that what happens during
24 the class period. If you look at their theory in Q1 of 2012
25 the very next quarter growth was 102 percent where the

1 company had projected growth of 85 to 90 percent.

2 THE COURT: So that's why they stopped the class
3 period at the fourth quarter as opposed to go to the fifth?

4 MR. BODNER: Well, Your Honor, it's their
5 pleadings. And what they do is they say that the truth was
6 somehow revealed that it was a false growth story with 91
7 percent growth. And if this was so false one would expect
8 the wheels to be coming off in subsequent quarters as well
9 and indeed quite the opposite. Growth in Q1 of 2012 was
10 102 percent when the company had projected 85 to 90 percent.

11 Second point is that we submit, Your Honor, that
12 that is a very odd, strange theory, not a strong compelling
13 inference, but it gets even stranger because the plaintiffs
14 claim that the defendants lied to the public during the
15 class period, that Green Mountain was straining, they lied
16 that it was straining to produce enough K-Cups to meet the
17 increase in demand.

18 And I'll get a little later into what was actually
19 said during the class period because as we lay out in our
20 briefs what was actually said versus what the plaintiffs
21 allege were said are two completely different things. I'm
22 not sure they are even on speaking terms.

23 But nonetheless their theory is that Green
24 Mountain lied during the class period that it was straining
25 to keep up with demand when in reality they say that Green

1 Mountain was actually drowning in inventory. That in
2 reality they say there was a massive surplus of excess in
3 expired product flooding their company's warehouses, but the
4 plaintiffs do not challenge nor could they, Your Honor, that
5 Green Mountain disclosed and did in fact spend hundreds of
6 millions of dollars during the class period and before and
7 after the class period, hundreds of millions of dollars to
8 increase manufacturing capacity.

9 So to believe the plaintiffs one has to accept the
10 inference that Green Mountain to continue the mirage so they
11 say of being a growth company that the company actually
12 spent hundreds of millions of dollars, again a figure they
13 don't contest, hundreds of millions of dollars to build more
14 production capacity, to produce more perishable product that
15 it could not sell, indeed it could not even sell the
16 products that it had on hand.

17 THE COURT: I had one factual question.

18 MR. BODNER: Yes, Your Honor.

19 THE COURT: I think probably you are the best to
20 answer. CW1 I think is Knoxville, I think CW1 was in
21 Knoxville, indicated that the increase in inventory began in
22 the first quarter of 2011 after a number of new machines
23 were purchased to increase essentially production, inventory
24 and production; is that right? Was there in 2010 a
25 significant investment, late 2010 a significant investment

1 from Green Mountain Coffee Roasters into production,
2 machinery, brand new machines, brand new production plans
3 and efforts?

4 MR. BODNER: Your Honor, investment into new
5 machinery from Green Mountain I believe was in 2010, 2011
6 and into 2012. I mean I believe the figures are even in
7 2012 it was close to a half a billion dollars in terms of
8 2012, not this class period, of additional manufacturing
9 capacity that they were investing in.

10 I mean to put this in perspective, Your Honor, in
11 the year before 2011 they had sold two billion, two billion
12 K-Cups. In 2011 it was four billion with a B, four billion
13 K-Cups, I mean the amount -- in North America. The amount,
14 the volume is staggering.

15 And it takes a lot of lines. The lines are about
16 half the length of this room, the individual lines. There
17 are a lot of lines that are required in order to go from two
18 billion to four billion in a very short period of time.

19 So back to the point in the inference the
20 plaintiffs would have this Court believe that even though it
21 was purportedly drowning in inventory and it could not sell
22 what it already had it continued to invest hundreds of
23 millions of dollars in producing more perishable product
24 that it purportedly could not sell.

25 That is not only not a cogent and compelling

1 inference it is a non-sensical one for were it true, were
2 there a fiction of that scale, and had there been such
3 incredible investment in needless, useless build up of
4 capacity to service some phantom demand why haven't the
5 wheels come off this company in the two years since the
6 class period has ended?

7 And indeed, Your Honor, as you can take notice of
8 the stock price yesterday closed at around \$75 per share.
9 It just doesn't add up.

10 Furthermore, to step back from the larger view and
11 into the complaint --

12 THE COURT: Just bring up the last few years. In
13 2012 it was 102 percent the first quarter. So has the, has
14 the increase in sales continued on this particular pace that
15 is somewhere between 90 and a hundred percent?

16 MR. BODNER: No. It started to level off
17 somewhat. I think the last figures I saw was somewhere
18 60 percent growth, which is still the envy, I mean find a
19 company since 2008 that would have 60 percent growth year
20 over year and that would be pretty amazing. But as you can
21 imagine as the numbers get larger, as you go from two
22 billion to four billion there begins to be a leveling off.
23 You know, the magnitude of the product is still huge but as
24 one would expect --

25 THE COURT: Interesting. Just as an aside

1 Starbucks has developed this product which competes with
2 K-Cups. Has that had a significant impact?

3 MR. BODNER: I'm not an expert.

4 THE COURT: Yeah, right.

5 MR. BODNER: I'm not an expert, but I sure as heck
6 drink Green Mountain Roaster Coffee.

7 THE COURT: You do?

8 MR. BODNER: Yeah, for a number of reasons.

9 But, Your Honor, to, to turn to the, to the
10 complaint here it's important to point out that an
11 additional reason besides just the frankly nonsensical
12 inferences that they would have this Court draw is the
13 plaintiffs really do not challenge at least in any
14 meaningful non-conclusory way the company's financial
15 statements.

16 The complaint fails to establish even a false
17 statement let alone a cogent compelling inference of
18 scienter. Stripped of its nefarious fin in its conclusory
19 allegations the complaint fails to reveal false anything
20 that Green Mountain or any of the defendants said that it
21 had done, was doing or would do during the class period.

22 The defendants clearly disclosed that from the
23 first quarter through the third quarter of 2011 that it was
24 investing, as I've already said, significantly in increased
25 production capacity. There's no allegation that that

1 capital expenditure or those future estimates of large
2 capital expenditures were in any way false. They don't take
3 any issue with that. They don't claim that.

4 There's also no meaningful challenge to the
5 quarterly net sales results that were disclosed by the
6 company. Indeed, to that point, it would be somewhat, to
7 that very point, nonsensical to claim that Green Mountain
8 spent hundreds of millions of dollars to increase production
9 capacity to make K-Cups it could not sell but still manage
10 extraordinary year over year sales throughout the class
11 period.

12 And indeed, as we cite in our brief, during the
13 class period, in the first quarter of 2011 net sales grew
14 67 percent. In the second quarter of 2011 year over year
15 sales grew 101 percent. In the third quarter of 2011
16 127 percent. The fourth quarter 91 percent. And then in
17 the first quarter, as I mentioned of 2012, sales grew
18 102 percent. Hardly a company where the wheels are coming
19 off. And the plaintiffs make no serious attempt in any way
20 to challenge those sales results.

21 They also don't have any meaningful challenge in
22 the complaint consistent with what's required under the
23 PSLRA to meaningfully challenge the inventory accounting,
24 the numbers that were reported. Either the inventory
25 numbers or the obsolescent reserves were never restated.

1 Not then, not now, not ever, during or after the class
2 period.

3 Nor have the plaintiffs provided any
4 particularized facts, any facts to establish that they
5 should have been. The CW's that they put forward about the
6 excess unreported inventory do not satisfy the Novak
7 standard, a standard that this Court is very familiar with.
8 They were low-level operational people. Their allegations
9 that they attribute to them, there is no probability
10 whatsoever that any of those low level workers had any
11 incite into the enterprise level of accounting for
12 inventory, obsolescence reserve or any other reported number
13 at Green Mountain.

14 And they are anecdotes, and that's all they are,
15 they are anecdotes from their confidential witnesses that
16 are utterly untethered to any timeframe, let alone a quarter
17 or quantity.

18 And there is no identification whatsoever, and the
19 Court can read this complaint forwards, backwards and
20 sideways to find that there were ever any reports, any
21 claims of inventory crisis, any issues with the obsolescence
22 reserves in any way, shape or form during the class period
23 or after that was ever presented to Mr. Blanford, the CEO,
24 Miss Rathke, the CFO, or any other officer or anybody else
25 at Green Mountain. Unlike what's required in Novak and the

1 other cases, and indeed as this Court has cited in its own
2 decisions, there's nothing in this complaint.

3 THE COURT: Let me just ask you, just taking you
4 back to 2010. In 2010 as a result of a re-statement of
5 their profit-loss statement --

6 MR. BODNER: Yes.

7 THE COURT: -- they acknowledged that there was a
8 problem with their controls, with their demand controls,
9 with the demand system to be able to actually assess what
10 the demands are going to be in the future, but also problems
11 with their inventory control. And as a result I think that
12 Mr. Blanford and Miss Rathke then took on the responsibility
13 of controlling the remediation plan that was set in 2010,
14 which suggests that they must have been extraordinarily
15 sensitive to inventory issues from that point forward, that
16 they should be following it because they've got the
17 responsibility to actually follow through with this
18 remediation plan.

19 So then from the plaintiff's perspective they see
20 these instances of warehouses being filled with product,
21 oftentimes product being no longer saleable because they've
22 expired. And I appreciate the fact that there is some
23 debate even though the numbers go up that the percentages to
24 inventory don't go up. But basically there's, there seems
25 to be an undercurrent of stocking up inventory, letting

1 product expire, problems with an inventory system which
2 theoretically Mr. Blanford and Miss Rathke should be aware
3 because they are particularly sensitive to inventory because
4 of the remediation plan. And also they clearly stated to
5 investors that they are on top of the inventory situation.
6 So how do you respond to that?

7 MR. BODNER: A number of ways, Your Honor. And
8 with all due respect, the restatement in 2010 did not have
9 anything to do with demand forecast, nothing whatsoever.
10 Demand forecasting became an issue of focus disclosed to the
11 market more when you got into 2000 -- the first two quarters
12 of 2012 after this class period.

13 THE COURT: That's interesting because that was
14 very much a part of, it was a part of the Horowitz decision
15 because there were a number of individuals, I think one of
16 the, one of the CW's I think was, I think it was CW2, which
17 I think is CW8 in this case, is somebody who said they have
18 no way of predicting reliably what the demand is going to be
19 in the future and that was a part of the problem that was in
20 the Horowitz case.

21 MR. BODNER: Your Honor, to be, with all due
22 respect --

23 THE COURT: Tell me -- no, you don't have to say
24 with all due respect. If I'm wrong I'm wrong and tell me
25 that. That's fine.

1 MR. BODNER: No, you're half right.

2 THE COURT: Oh.

3 MR. BODNER: The restatement --

4 THE COURT: Which half?

5 MR. BODNER: The restatement in 2010 had nothing
6 to do with demand forecasting whatsoever. In fact, it was a
7 relatively small restatement that had a lot of accumulated
8 problems. And the only thing that was inventory related
9 actually had to do with inter-company valuations because
10 when you do your -- you roll up your financials and while
11 you report sales between subsidiaries and amongst
12 subsidiaries, when you report those numbers out to the
13 public you consolidate that and you don't record as a sale
14 even for internal purposes. While you record for a sale
15 from one subsidiary to another you would never record that
16 as a sale to the public because it's within the company.

17 THE COURT: Sure. Now, that I appreciate.

18 MR. BODNER: So as part of that consolidation a
19 lot of the restatement inventory there were certain errors.
20 And that's all they were, they were errors that had to do
21 with inventory valuation not maintenance, not excess
22 inventory, not obsolete inventory, none of the issues they
23 are claiming are in play here.

24 None of them had anything to do with the
25 restatement. There was not -- they didn't find a bunch of

1 obsolete product that should have been written off and
2 wasn't. It had nothing to do with the 2010 restatement.

3 You are right though that there was a CW, an
4 anonymous source in Horowitz, as there is, and we think it's
5 the same one in this case, where they say --

6 THE COURT: CW8.

7 MR. BODNER: The CW8. In 2010 he had purportedly
8 had conversations about inventory.

9 THE COURT: I thought it was a she.

10 MR. BODNER: No, I think that is -- oh, it could
11 be a she. I think you may be right, Your Honor. But I
12 think you're right. You're right. But had conversations
13 with Mr. Wettstein and Holly in 2010, but as this Court held
14 in Horowitz and, frankly, we submit as it should hold here,
15 that was outside the period. She left long before the class
16 period and there's no particularity about what she was even
17 talking about anyway.

18 THE COURT: But she was saying at that time. I
19 mean she left in 2010, but she was saying at that time that
20 there was a significant problem with managing inventory,
21 with understanding inventory as well as predicting or
22 forecasting demand.

23 I thought that was her thrust. And as a result it
24 was not because of the restatement, I take your word for it
25 their re-statement was not dealing with this issue, but it

1 was or the underlying problems at that point with Green
2 Mountain Coffee Roasters' financial structure for a lay
3 person's definition. And so basically Mr. Blanford and
4 Miss Rathke took on the responsibility of this remediation
5 plan which included much more broad questions about demand
6 structure and demand forecasting and inventory issues.

7 And then I think the plaintiffs would be saying,
8 you know, they have really taken on this responsibility of
9 making sure that the inventory systems are in place and
10 reliable and here we have a pattern of, admittedly from,
11 from low-level employees describing these abuses of
12 inventory.

13 You know, whether they've got sufficient evidence
14 to show that product is being moved out of MBlock around the
15 block while the auditors are there and then come back and
16 put it back in I, you know, that's another question. But at
17 least isn't that part of their theory?

18 MR. BODNER: Your Honor, again, the remediation
19 plan was geared at the restatement which did not have to do
20 with the, you know, any issue that was supposed to exist in
21 terms of obsolete or excess inventory which seems to be the
22 thrust of what they are claiming here.

23 THE COURT: So you don't think the fact that they
24 were involved in the remediation plan puts them on notice
25 that there may be significant problems with inventory

1 controls?

2 MR. BODNER: Well, again, Your Honor, there's,
3 there's no allegation of any link to Mr. Blanford or
4 Miss Rathke of any problems. And, furthermore, putting
5 aside CW8 during 2010 there's no allegation in this
6 complaint whatsoever of there being any class period problem
7 with the accounting for inventory, either in terms of having
8 excess inventory that was never recorded or obsolete
9 inventory or the obsolescence reserve was improperly
10 calculated. There is no allegation at all during the class
11 period. And Your Honor has held that CW8 was before the
12 class period, no incite to what happened in the class
13 period. Even what little bit she says and doesn't describe
14 even what the problems presumably were, there is nothing,
15 nothing in this complaint that talks about problems.

16 And whether Mr. Rathke or Mr. Blanford were
17 focused on inventory, I'm sure they were focused on a lot of
18 things, there is absolutely nothing consistent with Novak,
19 consistent with this Court's own decisions, and nothing even
20 approaching the decision cited by the plaintiffs on the
21 other side, that would in any way indicate that there was
22 this growing problem or an awareness of a problem of excess
23 and unreported obsolete, unusable inventory beyond what was
24 already being disclosed to the markets.

25 There is none of that type of, of evidence

1 allegation of fact in this complaint as there needs to be
2 for them to establish that somehow the reports in the
3 financial statements, any of the numbers attributed to
4 inventory was wrong. They need much more than the anecdotes
5 of low-level employees that they provide here. And they
6 have none of that. None of that.

7 Your Honor, just sort of very quickly to move into
8 the motive allegations, and I'll defer to my brother for the
9 individuals more on that, but in terms of the motive
10 allegations there are five challenged sales. Four of those,
11 I'll be very quick here, four of those challenged sales were
12 pursuant to 10B 5-1 plans that had been put in place. I'm
13 sorry, 10b 5-1 plans, that were put in place very early in
14 the alleged class period and there's nothing magical about
15 the class period other than looking for the low, looking for
16 the high, and alleging that that's when the alleged fraud
17 took place. But there is no indication when these plans
18 were entered on May 5th of 2011 there were any known adverse
19 facts other than conclusory allegations to Mr. Blanford and
20 Miss Rathke. No discretion as to timing or amount for the
21 four sales. The fifth sale a day later by Mr. Blanford um,
22 again, there is nothing to call into question that those
23 sales were in any way based on any knowledge of insider
24 trading.

25 THE COURT: Well, I mean the fact is from, just

1 taking Miss Rathke, she started in the company, as I
2 understand it, in 2003. She had not cashed in any of her
3 options or stock until that point. And she then sells
4 337,000 shares and she makes 32 million dollars plus which
5 in Vermont standards is, is a lot of money.

6 MR. BODNER: Your Honor, in Boston that's a lot of
7 money.

8 THE COURT: Right. That's a lot of money.

9 MR. BODNER: It is a lot of money.

10 THE COURT: And so does the fact that there's a
11 lot of money being earned by Miss Rathke, and she never
12 cashed in anything before, suggest to you that there might
13 have been some thought or some plan, you know, I appreciate
14 that a lot of what she sold was back to 2003 and was going
15 to expire, but still a lot of money.

16 MR. BODNER: It is a lot of money, Your Honor.
17 But that's why I appreciate Your Honor who isn't just going
18 to look at that and stop doing any analysis as was frankly
19 took place in Fifield when you looked at Mr. Stiller's
20 66 million dollars in sales. And size doesn't control here
21 because more of that is required.

22 THE COURT: Well, it was a little different in
23 regard to Mr. Stiller. Mr. Stiller's role was quite a bit
24 different. He also had actually disclosed the fact that he
25 was, well in advance he was going to want to get rid of or

1 sell, not get rid of, sell two million shares and so he sold
2 one million shares. So it's part of a larger context. But
3 that's, that was 66 million dollars. Yeah, that's, that's
4 --

5 MR. BODNER: That's a lot of money.

6 THE COURT: That's a lot of money.

7 MR. BODNER: Your Honor, but, again, as you're
8 well aware, as you have said, and in fact quoting The Second
9 Circuit, I believe context matters. And when you look at
10 the context here there was a plan, but it was not a
11 nefarious plan. And it's important to understand the
12 context.

13 Yes, she had not sold shares since 2003, but
14 remember there was a very, and this came up in Horowitz, a
15 very prolonged period when they could, senior officers could
16 not trade because they went through four acquisitions and a
17 number of strategic investments so they could not trade.

18 And when she sold her shares remember the
19 operative date is May 4th of 2011, not August of 2011 when
20 the shares were sold.

21 THE COURT: Can I just ask a purely legal
22 question?

23 MR. BODNER: Yes, Your Honor.

24 THE COURT: We're on a motion to dismiss. We're
25 essentially looking at the complaint to determine whether it

1 satisfied the legal standards essentially. And I appreciate
2 that this is unique because it's a securities fraud --

3 MR. BODNER: Right.

4 THE COURT: -- and it has these unique
5 responsibilities, unique, well, responsibilities basically.
6 But when you start throwing out well of course there were
7 all these, there was this period of time in which they could
8 not sell because of all of the purchases that Green Mountain
9 Coffee Roasters were engaged in, is that something that the
10 Court can consider?

11 MR. BODNER: Well, there are a couple of things.
12 Yes, I think the Court can consider it. There are --

13 THE COURT: Why is that because that's essentially
14 a defense and that is not in the complaint?

15 MR. BODNER: Well, let me start with this. The
16 Court can certainly consider 10b 5-1 plans. The law is very
17 clear about that. The Court can look at the Form 4's and
18 decide whether 10B 5-1 plans apply or not. That's exactly
19 what this Court did in both Horowitz and the Golaskorski
20 case. So the Court can look to that.

21 Furthermore, under Tellabs in assessing, in
22 assessing whether or not there is a cogent and compelling
23 inference the Court is not just allowed it is required to
24 look not just at the four corners of the complaint, but it
25 is also permitted, required to look at judiciously noticeable

1 facts. We submit that --

2 THE COURT: Judicially.

3 MR. BODNER: Judicial facts that the Court can,
4 can notice as a matter of law. And in an instance in which
5 it is clear undisputed --

6 THE COURT: Can I do that then? Can I actually
7 take her representation that or your representation that she
8 could not sell her shares or exercise her options during
9 many years up until 2011 when the window opened?

10 MR. BODNER: Well, Your Honor, what you can do is
11 you can look at documents that are referenced in the
12 complaint. Tellabs says that. And in the disclosures that
13 are referenced in the complaint about these sales the
14 company itself discloses that on March 4th of 2011 it wasn't
15 just Mr. Rathke -- Miss Rathke or Mr. Blanford, it was eight
16 other directors and officers.

17 THE COURT: Right. There were 10.

18 MR. BODNER: There were 10.

19 THE COURT: Right. And that is in the complaint.
20 In other words, there's a reference in the complaint to a
21 document which shows that the window has been opened up --

22 MR. BODNER: That a number of --

23 THE COURT: -- and 10 people went through.

24 MR. BODNER: There's a disclosure that a number of
25 officers have and directors have entered 10B 5-1 plans.

1 And, frankly, the reason companies make those types of
2 disclosures is that if they see insider selling people start
3 to get nervous because does that mean something bad is going
4 to happen coming down the pike. So they want to provide
5 explanations.

6 And so I think that because, you know, those sales
7 have been referenced the Court can take that, that type of
8 evidence into consideration.

9 And what I can say is certainly you've read the
10 decisions as well as I have. A lot of courts, you know,
11 take cognizance of whether there are open windows or not.
12 Again, it's a data point. It's a data point. We don't say
13 it's the dispositive point. We think there are lots of
14 dispositive points. It's a data point.

15 So, Your Honor, on, you know, moving from the
16 motive allegations, again, which if you have more detailed
17 questions I can answer now, later or --

18 THE COURT: Mr. Byrne will be speaking to that.
19 That's fine.

20 MR. BODNER: Thank you. But let me now move to
21 the innocent inference that we feel and submit under Tellabs
22 is much, much more compelling than frankly what we submit is
23 the nonsensical inference that the plaintiffs are trying to
24 sell to this Court.

25 Green Mountain was a dynamic growth company with a

1 relatively new innovative product. Fiscal year of 2011 was
2 a period of extraordinary rapid expansion, both in terms of
3 the demand for its product and the sale of its product.
4 Going from two to four billion, were a B, K-Cups.

5 There was a huge expansion of its production
6 capacity that was invested to the hundreds of millions of
7 dollars leading into the class period, during the class
8 period and following the class period.

9 The defendants told the market that it was
10 increasing production capacity in order to increase
11 inventory in order to meet the increased demand. They told
12 the market that.

13 When demand in the fourth quarter fell beneath
14 what it had expected it was only, and I really do mean the
15 quote marks around only, that the demand for the fourth
16 quarter in this high flying jet machine of breaking new
17 territory with a new novel product that was growing hand
18 over fist when year over year growth and the fourth quarter
19 was only, in quotes, 91 percent as opposed to the projected
20 100 to 105 percent, Green Mountain experienced a brief
21 increase in its inventory. No surprise there. No fraud
22 there. Perfectly logical. The markets, had they been
23 watching, knew that. Is it a gray fact, you know, in terms
24 of an investor? Not necessarily so. Is it fraud?
25 Absolutely not. Some demand didn't, didn't --

1 THE COURT: All right. So you think the increased
2 amount of inventory was because you didn't read, meet the
3 projections that you had set?

4 MR. BODNER: No, Your Honor. No. I think --

5 THE COURT: Because I thought the, in the, in the
6 first statement from Mr. Blanford back in the first quarter,
7 the first quarter statement what, or maybe this was during
8 the interview, I guess this was maybe during the interview,
9 he had said that they are going to try to build up the
10 inventory to give them a cushion for the fourth quarter when
11 the holidays hit and that that was -- this was all a
12 projected plan to increase inventory so that they've got
13 some money in the bank.

14 MR. BODNER: Your Honor, you are very close to the
15 facts. And I, and I appreciate that. And you're right.
16 There are two things going on here. The predominant, the
17 way you get to that level of inventory, and I'll get to that
18 in a second, is it was part of a plan. They absolutely
19 where building inventory. They were building inventory in
20 order to serve growing demand.

21 At the same time they had projected as best they
22 could that demand in Q4 would be, Miss Rathke said in a
23 conference call, high 90's to 100, 105 percent. And the
24 guidance they gave to the market for Q4 it was 100 to
25 105 percent. It came in at 91 percent.

1 So clearly there could be some uptick in inventory
2 attributable to that, but really the elephant of inventory,
3 the huge part of it was absolutely part of, as they said in
4 Q1 we're capacity constrained, we need to build more
5 manufacturing capacity. In Q2 they said, we're catching up.
6 And in Q3 we've caught up. Why? Because they are putting
7 more lines online in order to produce coffee in order to
8 build inventory. That was the ramp up in inventory.

9 In Q1, which is the holiday season under the
10 fiscal year for Green Mountain, that demand, which was, you
11 know, projected, some demand projected to 100, 105 in Q4, it
12 comes in at 91 in Q2, well, again, the world doesn't work by
13 fiscal quarters.

14 In the holiday season, Q1 of 2012, the company had
15 projected I believe 85 to 90 percent. Growth came in at
16 102 percent. So, you know, again, as part of the flow of
17 the business, particularly this high growth business, it is
18 not only an innocent explanation it makes the most sense and
19 it no way leaves room for any cogent or compelling inference
20 of fraud that somehow there was a false story either as to
21 inventory or as to, or as to the growth of the company.

22 And, in fact, to talk about excess and expired
23 inventory or any of it being hidden look at what the company
24 reported and disclosed throughout Q1, throughout the class
25 period, the alleged class period.

1 In the first quarter it disclosed inventory of 269
2 million dollars. In the second quarter the company
3 disclosed inventory of 309 million dollars. And in the
4 third quarter it disclosed inventory of 417 million.
5 Clearly a disclosed ramp up of inventory.

6 And that ramp up in inventory is consistent as
7 your Court, as Your Honor noted with what the executives had
8 been telling the market. That they were capacity
9 constrained in Q1.

10 And look at our brief and look at the disclosures.
11 When they really talk about capacity constraints and
12 struggling to catch up with capacity they say that in Q1.
13 They clearly say it and they embark in order to address it
14 to get ready for the holiday season, Q3 and Q4.

15 In the second quarter they tell the market that
16 they are catching up to demand in Q2 due to more
17 manufacturing capacity coming online. And indeed if you
18 look not at the way the plaintiffs spin it or allege it, we
19 think mischaracterize it, but you look at what was actually
20 said in Q3 is that they had caught up to short-term demand.

21 Did they think that they were going to have to add
22 more production capacity to get demand in the next year and
23 the year beyond that? Yes. Were there plans disclosed to
24 do that? Yes. But in terms of meeting this holiday demand
25 in their disclosures for Q3 they said we think we're there.

1 We've got enough capacity online.

2 And all of the discussions and the conversations
3 with analysts, unlike the cases that are mostly cited by the
4 plaintiffs, is not a concern, geese, do you guys have too
5 much inventory? Are your optimal inventory levels or your
6 inventories, are you sure you are not too much inventory, is
7 this aging inventory a problem. All of the questions were
8 are you going to have enough, will you have enough
9 inventory. And every answer was geared at from the
10 perspective of you've been capacity constrained in the past
11 are you still capacity constrained, will you have enough
12 inventory.

13 So, again, the disclosures, the disclosures that
14 were actually made, not as characterized, are perfectly
15 consistent with the disclosures of the ramp up of inventory
16 throughout.

17 Now, because they don't have any hard facts the
18 plaintiffs resort to these CW accounts of lots of inventory.
19 And those are, for reasons I've already covered, they are
20 insufficient. They are anecdotal. Nowhere do they plead
21 that there was a misstatement of the financials with any
22 sufficiency to show that this build up of inventory, again,
23 where they are selling four billion K-Cups a year somehow
24 was not properly recorded.

25 There's no specificity as is required as to

1 timeframe, as to quantity. There's an obvious explanation
2 for the buildup and the ramp up of inventory that people are
3 observing. It's part of the plan. It's what they need to
4 do. It's what they are telling the market they are going to
5 do.

6 And, in fact, to quote Your Honor, as you said in
7 Horowitz, the disposal of significant quantities of expired
8 product is hardly surprising for a company that produces
9 massive quantities of perishable goods. And those massive
10 quantities of perishable goods were even greater during this
11 class period than during the Horowitz class period.

12 Now the plaintiffs have alluded to this. They
13 resort to limited allegations about product that was
14 supposedly moved from facilities in advance of audits. And
15 the implication somehow from that is that this is improper
16 conduct that was hidden and not disclosed.

17 But they supply through these anecdotes none of
18 the particularity that's required to establish a false
19 statement let alone any type of false statement in, in the
20 financial statements.

21 There is no timeframe in any way, shape or form
22 what quarter that any of these so-called pre-audit movements
23 relate to. And that's actually very important. And let me
24 spend one minute there.

25 The class period is Q1, Q2, Q3. They are

1 challenging statements made and contained in quarterly
2 filings, 10 Q's. And as the 10 Q's state on their face
3 those are non, unaudited financial statements. Green
4 Mountain, like every other public company I am certainly
5 aware of, do not audit their quarterly financial statements.
6 Their audits are for their annual financial statements. And
7 audits are conducted in connection with and leading up to
8 the close of the fiscal year not the fiscal quarter.

9 And so in these complaints when they don't give
10 time periods, they don't give quantity, there's nothing
11 attributes into the quarter, that's important in part,
12 again, a data point, is that what audits are they even
13 referring to. Because the face of the, of the financial
14 statements themselves that are in issue here are unaudited.
15 They are not audited.

16 Specificity is required under the PSLRA as a
17 filter to keep out strike suits for a reason. And, and here
18 that filter when applied doesn't work because their
19 allegations, they are anecdotal, they are unspecified and
20 they don't add up, they don't make sense. I don't even know
21 what audits they could possibly be referring to.

22 In fact, CW's 2 and 7 that they use for that they
23 don't even say what product they are talking about; brewers,
24 K-Cups, coffee bags. No reference to that in any way, shape
25 or form. And their CW's certainly --

1 THE COURT: Well, the full financial audit is
2 different than the inventory audit I assume. What you are
3 suggesting is that even inventory audits, that's the
4 determination as to what the size of the inventory is only
5 happens once a year?

6 MR. BODNER: Well, I can't --

7 THE COURT: Is that right?

8 MR. BODNER: I can't represent to Your Honor when
9 inventory audits, but what their reference is about outside
10 auditors, outside audits in many of their allegations. And
11 when they are talking about outside audits it would be odd
12 for there to be, if not unheard of, to have an outside audit
13 of inventory in Q1 when the audit would be of the entire
14 year's financial statements.

15 And, in fact, actually, Your Honor --

16 THE COURT: But that's, isn't that apples and
17 oranges? I mean you're talking about an audit of a
18 financial statement. You are not going down to production
19 facilities and trying to count what the inventory quantity
20 is, you're taking figures that have been determined by
21 others.

22 I would assume, I thought this was almost, when
23 they were talking about audits it was somebody trying to
24 figure out what kind of inventory existed.

25 MR. BODNER: But, Your Honor, they make reference

1 at various points to outside auditors.

2 THE COURT: Oh, all right.

3 MR. BODNER: And so that's what, I'm only, again,
4 Your Honor, I am, you know, I'm not trying the case. I'm
5 arguing to dismiss the complaint. So I'm going in part what
6 they are saying in the complaint. And they are saying about
7 outside audits. You know, they refer to outside auditors.
8 And all I'm saying is to the extent they are referring to
9 outside auditors it doesn't make any sense.

10 THE COURT: Can I just move you to a different
11 topic?

12 MR. BODNER: Yes.

13 THE COURT: Because there is 500,000 brewers that
14 were being sent to, is it QVC?

15 MR. BODNER: Yes.

16 THE COURT: Can you just tell me, you know, just
17 summarize what, what is the situation there? You are
18 suggesting that if there were 500,000 of these things that
19 were kept somewhere around, first of all, there's no proof
20 that necessarily this was registered as a sale, but more
21 than that, if there's 500,000 of these around you filled I
22 think it was countless numbers of trailers or mobile homes.

23 MR. BODNER: I think it's hundreds, Your Honor. I
24 mean to put that in perspective, I'm sorry, --

25 THE COURT: Yeah, I'm just interested. What, is

1 that right? I mean --

2 MR. BODNER: Yes. We actually, if you look at our
3 brief, Your Honor, the way we -- the way we put it in our
4 brief is that, you know, if you take the -- if you take the
5 size of the brewer box and you multiply that times -- if you
6 multiply that times 500,000 and you divide that by a
7 40-foot, was it a 42-foot 18 wheeler tractor-trailer, you
8 come up with hundreds of tractors and trailers. I mean this
9 would be moving an Army of brewers.

10 To put it in perspective, again, a company that is
11 selling four billion K-Cups you sell a lot of brewers in
12 order to sell four billion K-Cups on an annual basis.

13 And the, the purported 500,000 brewers that were
14 supposed to just go to QVC constitute, would constitute,
15 have constituted 40 percent, 40 percent of all brewer sales
16 that were reported for that period.

17 THE COURT: Isn't this very simple to find out
18 whether it ever happened?

19 MR. BODNER: It did not happen. Your Honor, I
20 mean I'm arguing on a motion to dismiss.

21 THE COURT: Right.

22 MR. BODNER: And what I am saying is that as the
23 principal legal argument, the principal legal argument, Your
24 Honor, is that, the legal argument, is that the -- it fails
25 on the face of the complaint. Why? Because even the

1 plaintiffs, even the plaintiffs put it in conditional, maybe
2 if, maybe this, possibly potential language.

3 They don't even say that it happened. And they
4 say it never left the dock. And as this Court is well
5 aware, you know, the two hours I spent in oral argument in
6 the Horowitz case explaining the published -- and this
7 period there's no question about the disclosed revenue
8 recognition policy. It has to leave the dock, it has to be
9 shipped from MBlock before revenue is recognized.

10 The plaintiffs in their own allegations say it
11 didn't even leave the dock. So there was no revenue
12 recognition event. And they plead no facts with no one who
13 satisfies the Novak standard that somehow the company failed
14 to abide by its revenue recognition policy.

15 So for the very same reasons this Court dismissed
16 Horowitz is exactly applies here as a legal matter. But if
17 your Court is asking did this happen, the answer is no. And
18 I would assume that the SEC who opened an investigation in
19 2010 would have been like hell, fire and brimstone on this
20 company had it actually happened.

21 THE COURT: As you remember in the Horowitz case
22 the SEC investigation was still pending. Is it still
23 pending?

24 MR. BODNER: It's pending so far as we can tell.
25 It has nothing to do with MBlock in any way, shape or form.

1 It's hard to tell what they are doing because it's been
2 sitting out there. They haven't closed the file.

3 THE COURT: So it still exists?

4 MR. BODNER: It still exists, but, Your Honor,
5 they are not in the habit of telling us what they are going
6 to do or not going to do.

7 THE COURT: Really? Okay.

8 MR. BODNER: But at any rate so if you're asking
9 about, you know, I'm not up here arguing as a factual matter
10 it didn't happen. I don't think that the Court need go that
11 far in terms of kicking this claim out. What I am saying is
12 a legal basis, just like Horowitz, there's no revenue
13 recognition event because that's the allegation um, that on
14 the face of the complaint they themselves say it didn't
15 leave the dock, they themselves put it in very tentative
16 terms. But, furthermore, it is, it is a logical and
17 logistical nonsensical proposition.

18 THE COURT: Impossibility.

19 MR. BODNER: Impossibility. Especially you would,
20 you would have a lot more confidential witnesses out there
21 than you would now than one person from N. block talking
22 about 500,000 brewers that supposedly were specially packed
23 and unpacked and moved back. Um, it just, it just doesn't
24 make sense, it doesn't add up.

25 Your Honor, if you would like, I know I've been

1 going on for quite a while, I feel unless you feel that
2 there's not an issue address their allegations concerning
3 the obsolescence reserve because that is contained within
4 their, within their complaint.

5 THE COURT: Sure. You can address that.

6 MR. BODNER: The plaintiffs challenge the reported
7 obsolescence reserves as somehow being underreported during
8 the class period. And they do that based almost exclusively
9 on CW4 who, again, is identified as a machine operator. You
10 know, not anyone that has anything to do with accounting by
11 any stretch of the imagination and indeed is at a, you know,
12 a respectable, but nonetheless, a low-level, you know,
13 hourly position.

14 THE COURT: Well, they extrapolate from what he, I
15 guess it's a he, observed to its logical extension. This
16 would have meant numbers far in excess of what is reported
17 in the obsolescence figures that you've submitted; right?
18 That's basically what --

19 MR. BODNER: Well, you know, extrapolated in an
20 enigma, you know, wrapped in a speculation, to completely
21 destroy the quote from Winston Churchill, this is a pure
22 speculation, you know, an extrapolation based on pure
23 speculation.

24 And, in fact, you know, just to take a small
25 example, Your Honor, there's no -- first, this is a machine

1 operator who has absolutely no incite, possibility of
2 incite, let alone probability of incite, into any enterprise
3 accounting. But there's not even -- they don't even talk
4 about, well, are you talking about the product from a
5 revenue perspective what it would get or from a cost
6 perspective which is how it would be calculated which is why
7 you can't rely -- why Novak requires more than certainly
8 what these plaintiffs have offered here. But, furthermore,
9 we're talking about an obsolescence reserve. And that has a
10 special place in The Second Circuit which is, you know,
11 obviously as the Court has -- it's a very sophisticated
12 court and it knows what reserves are all about.

13 And the law around whether or not a false
14 statement can be plead with regard to reserve it's treated
15 more like an opinion. And in the Wachovia case it is, you
16 know, it makes clear that if, if plaintiffs are going to
17 succeed in challenging a reserve, and as the company itself
18 has disclosed, there is a lot of intense judgment or to
19 quote the company significant judgment that is applied to
20 setting the reserves.

21 And in order -- in The Second Circuit this Court
22 defined a false statement as to reserve that's adequately
23 plead under the PLSRA they have to plead not only that the
24 obsolescence reserve was wrong. They haven't even done
25 that. They have to plead that it wasn't believed at the

1 time, that there was -- they didn't have faith in it, that
2 the opinion which was at root, the judgment did not hold.

3 THE COURT: Well, they are using CW4 to say that
4 the figures were wrong despite the fact that they actually
5 don't necessarily confront the figures themselves. They
6 don't necessarily say that the obsolescent figures are wrong
7 in their pleadings. They are suggesting that CW4, if you
8 take logically what he observed, and you extrapolate to its
9 logical conclusion, then it must have been wrong, but
10 there's no proof of that.

11 MR. BODNER: Well, but, Your Honor, not only is
12 there PSLRA sufficient pleading of that because if that held
13 then the Court in The Second Circuit would suffer from a
14 plethora of reserve challenges where they can get a floor
15 worker to say something and then extrapolate enterprise-wide
16 on a multi-billion dollar company. To extrapolate that the
17 reserves were wrong I think any fidelity to The Second
18 Circuit decisions on what's really required in order to
19 challenge a reserve through the filter of the PSLRA for more
20 is required in extrapolation based on speculation,
21 particularly unspecified speculation, about what dollar
22 figures are they really even talking about.

23 THE COURT: Okay.

24 MR. BODNER: So in that regard, furthermore, Your
25 Honor, you have to understand that in terms of the

1 obsolescence reserve look at what this company faced. I
2 mean this was a dynamic environment of not declining demand,
3 huge increasing demand, trying to manufacture inventory to
4 keep up with mind numbingly large numbers of increasing
5 demand for a perishable product. I mean that is not an easy
6 job to do. And you know what? They did a pretty good job
7 of it.

8 As we've argued in, in our brief if you look the
9 variation of the obsolescence reserve is actually remarkably
10 good. It varies some as one would expect, but there's no,
11 the, the fourth quarter when the plaintiffs purport that the
12 truth was revealed the obsolescence reserve goes down. It
13 goes from point nine to point eight.

14 They try to make much out of the fact that, you
15 know, in absolute terms it doubles when you get into Q1 of
16 2012 that trend up is, actually matches the trend up in, in
17 Q1 of 2010. There's a blip, not a huge blip, and when you
18 compare that to the huge number of sales, the 102 percent
19 growth in sales in Q1, it hardly is a case like
20 Scholasticate, Atlas or any of the other cases where the
21 wheels were coming off of a business or, or the Novak case
22 involving Anne Taylor where product that was clearly
23 obsolescent and should have been recorded as such during the
24 class period is revealed later by huge massive writeoffs and
25 admissions that it was old product.

1 There's none of that. There's not even a hint of
2 that here. And they certainly don't have the witnesses
3 under Novak that could anywhere get close to making that
4 pleading requirement as required under, under the law in The
5 Second Circuit.

6 THE COURT: All right. So maybe we should, do you
7 have something else quick because --

8 MR. BODNER: No, Your Honor, --

9 THE COURT: -- Mr. Byrne is --

10 MR. BODNER: I think I've said my peace. I very
11 much appreciate your patience and apologize for the length,
12 but thank you.

13 THE COURT: You don't have to apologize for the
14 length. I would say I am guilty of contributory negligence.

15 MR. BYRNE: Good afternoon.

16 THE COURT: Good afternoon, Mr. Byrne.

17 MR. BYRNE: I'm primarily going to address the
18 state of mind issues related to Miss Rathke and
19 Mr. Blanford. And before I get into those, you know, there
20 was some discussion about CW8 in your colloquy with
21 Mr. Bodner. And there's three points, actually four points
22 that I would like to make about that.

23 The first is CW8 the allegation, as far as I can
24 tell when I was flipping through the complaint, comes out of
25 Paragraph 127. And that relates to corporate scienter.

1 There's no connection at all as there is with any witness
2 here to, that shows any sort of knowledge on behalf of Ms.
3 Rathke or Mr. Blanford. And the plaintiffs themselves
4 recognize that that doesn't go to that because they put it
5 in the corporate scienter.

6 THE COURT: Right. I think that that is true in
7 this particular case. I thought if CW8 is the same as CW2
8 or 3 in the earlier, the Horowitz case, there's some
9 allegation that in fact CW8 had direct connection with
10 Stacy, is it Stacy, Holly and Wettstein who then were very
11 close with your clients. And there was some argument that
12 there should be some expectation that their recitation of
13 the things that CW8 said would have been shared with your
14 clients. But you're right that's not in this class period,
15 it's not in this case.

16 MR. BYRNE: Which gets to what was going to be the
17 third point, which I'll now make the second point, is that
18 this sort of allegation is one of these must have known
19 allegations which clearly under The Second Circuit law is
20 not something that's permissible. You can't, you know,
21 plead out a bunch of facts and say based on that they must
22 have known. So, you know, --

23 THE COURT: Well, there is that core, there's the
24 core doctrine which still exists, although I guess it's
25 under attack, but theoretically the base of that doctrine,

1 if it's still applicable, is if you are in a particular
2 position in a company you are expected to know what is going
3 on under those things which are of particular concern. And
4 so that's why I bring up, you know, the whole question of
5 the remediation agreement because your clients were
6 responsible for the remediation plan and to enforce it. And
7 is there something analogous to the core doctrine there
8 which suggests that they should have known what was going on
9 with inventory?

10 MR. BYRNE: Well, and that was the second point,
11 which is now my third point, is that in paragraph --

12 THE COURT: Your second point or your third point?

13 MR. BYRNE: My third point is that the restatement
14 is not something that's mentioned in Paragraph 127. And
15 that's, you know, it's, again, getting -- and it's also, as
16 Mr. Bodner pointed out, it's factually much different than
17 what the allegations here are. And Mr. Bodner did a good
18 job going through that.

19 But more generally I wanted to get back to the
20 scienter part of this. And it's clear that the plaintiffs
21 have failed to show either motive and opportunity or
22 conscience recklessness.

23 There's no motive in this case. And I want to
24 start with Mr. Blanford. There's just no way that his stock
25 sales could be unusual. And there's three points here. I

1 think the most important one is that these stock sales
2 occurred on the third Tuesday of every month in about the
3 same amount, the final three stock sales.

4 THE COURT: And they extended into the following
5 year, as I recall, --

6 MR. BYRNE: Yes.

7 THE COURT: -- into the beginning of the next
8 fiscal year 2010 -- 2012.

9 MR. BYRNE: Right.

10 THE COURT: And it always was approximately 50,000
11 shares.

12 MR. BYRNE: It was approximately about that
13 amount.

14 THE COURT: I mean it's a lot of money. Don't
15 you, I mean, I don't mean to be overwhelmed here, nor do I
16 mean to suggest that I'm naive, but your argument is, well,
17 this is a relatively small amount, he only made 16 million.
18 Well, pretty soon you're getting into real money.

19 I appreciate if you, if you take what I've said
20 about considering options as well as the actual stock you
21 own, including that, his percentages is relatively low, less
22 than 20 percent. So, you know, I appreciate your argument
23 in that respect. It's just, I guess this is just a
24 different world.

25 MR. BYRNE: Yeah. Well, as far as context goes my

1 first job I made two dollars an hour and my uncle took out
2 all the food that I ate. So what I currently make now is,
3 would be a lot of money compared to what I made when I was a
4 kid.

5 THE COURT: Great. So let's see I didn't know
6 that you were that old. You must be 90, 95?

7 MR. BYRNE: Well, you know, it's on the farm. I
8 think the wage regulations were a little different there.
9 But, in any event, I think it's really crucial. What that
10 point brings out is that the context is critical to any sort
11 of inquiry.

12 And when you're talking about numbers in an
13 absolute sense what you really should be looking at is how
14 it fits into the context of the entire thing. And as the
15 Mr. Blanford sale was that he retained 88 percent of his
16 holdings. And it makes no economic sense for him to go for
17 the quick buck here.

18 What he's really doing is, is concern about the
19 long-term growth of the company. And there would be no
20 reason for him to do this.

21 And the third point here is that he had, you know,
22 as you recognized, they had stock sales both before the
23 class period and after the class period which indicates that
24 there's a regularity. But if Mr. Blanford's stock sales are
25 viewed, you know, as unusual there's really no corporate

1 executive anywhere that could ever sell stock.

2 I mean this is on a very regular pattern. It's
3 happening every third Tuesday of the month. And as you
4 noted in the Fifield decision it's over a much longer period
5 of time and there's regularity that's been established.

6 For Miss Rathke's stock sales, again, they are not
7 unusual. And there's three points that I have here.

8 The first is that this 10B 5 trading plan was set
9 more than three months before the sale. And there's no
10 allegation in the complaint that she entered into the plan
11 with any sort of knowledge as, knowledge of what was
12 actually alleged to have been going on in this complaint.

13 And the stock sales took place -- the second point
14 is that the stock sales took place more than two months
15 before the disclosure of any alleged negative information.
16 And, you know, at a certain level of generality when you
17 start to try to compare inferences there's, there's a
18 fundamental inconsistency with what the plaintiffs are
19 saying here.

20 At one level they are saying that the company
21 cannot see into the future because of this demand planning
22 issue, but on the other hand they are saying that
23 Miss Rathke has near clairvoyance with being able to predict
24 the stock price that's three months in advance even though
25 there's external forces out there that are acting on the

1 stock price. Like, like, you know, the Thorn (ph)
2 presentation and the short sellers out there.

3 So that it just doesn't hold -- that sort of story
4 just doesn't hold together that somebody would be able to
5 predict the stock price three months in advance with as much
6 uncertainty that was out there with short sellers. As we
7 said in our brief this is a short seller's dream. It just,
8 the story just doesn't make sense.

9 And the final thing I think we -- the final point
10 on Miss Rathke's stock sales is that it should include the
11 options. And when you do include the options it's, it's
12 35 percent when all the options are included or 38 percent
13 when you're talking about, when you are excluding the
14 un-exercisable options.

15 Again, you are in the same sort of economic
16 position where it makes more sense, if you are holding onto
17 that much stock it makes more sense that you're invested in
18 the long-term.

19 And the other point about the options is that
20 there is --

21 THE COURT: Would it be fair to say then by a, by
22 just calculating 33 million it's only 35 percent of her
23 entire holdings, her holdings are close to a hundred million
24 dollars in stock?

25 MR. BYRNE: I think that's, I think the math is

1 correct, although I'm not always great at doing math on the
2 spot. I think you're correct.

3 THE COURT: And she had been working there eight
4 years at that point?

5 MR. BYRNE: Yes.

6 THE COURT: That's pretty good pay.

7 MR. BYRNE: Right. And I think that's --

8 THE COURT: It's pretty good pay anyway. I'll get
9 over this at this point, but --

10 MR. BYRNE: But I think it is a important point
11 when you said the eight years that she had been working
12 there. You know, the reason that the company was even in
13 the position that it was in was due to the, you know, the
14 hard work of all of the people that worked at the company.

15 And when you look at economic motives even at the
16 pre-sale, the pre-class period sale price she certainly had
17 motives to exercise the options because even, and I think my
18 math is correct on this, even at the pre-class period sale
19 price it was 20 percent, it was 20 times what the option
20 strike price was.

21 And as the case that the plaintiffs pointed out
22 looking at the, looking at the option strike price and
23 seeing what the sale price would be is sufficient to give a
24 non-culpable explanation of why they would go out and do
25 this.

1 And in this case it makes perfect sense. If the
2 strike price is a buck 59 and the price is 20 times that
3 there's adequate non-fraudulent reasons to go out into the
4 market and do this.

5 Two points on the scienter for both of them. The
6 first point is that the participation in the remediation
7 plan and the public disclosure, instead of indicating that
8 they were engaged in some sort of state of mind for a
9 fraudulent intent, that actually shows that it cuts against
10 that.

11 And the cases that we've cited in our brief show
12 that when they are engaged in this public disclosure and
13 remediation that is actually that you draw the inference the
14 other way.

15 And the final, the final point on this, on the
16 motive and opportunity that there are really no facts
17 alleged, no specific facts that are alleged in the complaint
18 that connect either Miss Rathke or Mr. Blanford to any sort
19 of the alleged fraud that's occurring here.

20 I want to touch briefly to the conscience
21 recklessness. And there's two points here. One is that
22 there's no confidential witnesses that had any contact with
23 Mr. Blanford or with Miss Rathke. And that's, that is
24 significant. You know, they are trying to create a story,
25 but none of the story goes to Mr. Blanford or Miss Rathke.

1 And the second thing is that the plaintiffs do not
2 specifically identify any sort of report or conversation
3 that would have alerted Blanford or Rathke to the falsity of
4 their statements. And I think that's telling in a lot of
5 ways. You know, when you are trying to put together a
6 complaint I understand that you're trying to artfully draft
7 it, but the things that are missing are often determinative
8 of, you know, what, the way this motion should be decided.

9 And the things that are frankly missing in this is
10 that there are no comp, there's no contact with either Mr.
11 Blanford or Miss Rathke. And there's no reports that
12 specifically identify -- there's no report or conversation
13 that's specifically identified by the plaintiff that would
14 have alerted them to the, to the alleged falsity of their
15 statements.

16 THE COURT: All right. Okay.

17 MR. BYRNE: Thank you.

18 THE COURT: I appreciate it. Let's take a 15
19 minute recess at this point so you can prepare your
20 arguments. And we can take a brief break and be back in 15
21 minutes.

22 (The Court recessed at 2:38 p.m. and resumed at
23 2:55 p.m.)

24 THE COURT: Whose going to argue on behalf of the
25 plaintiff?

1 MR. LYNN: Mr. Rosen, Your Honor.

2 THE COURT: Okay. Good afternoon.

3 MR. ROSEN: Good afternoon, Your Honor. Thank you
4 for giving me the privilege of being here. I'm Mark Rosen
5 for the plaintiffs. I'm joined by my friends and colleagues
6 Mr. Browne from Bernstein Litowitz firm, Mr. Yarnoff from
7 the Kessler Topaz firm and most importantly one of our
8 client representatives Mr. George Neville and Assistant
9 Attorney General from the State of Mississippi.

10 THE COURT: Okay.

11 MR. ROSEN: Your Honor, has --

12 THE COURT: This must be an adjustment as far as
13 the temperature outside. Do you like it?

14 MR. ROSEN: I think he's -- I think he's ready to
15 go home, Your Honor.

16 Your Honor, I don't want to assume facts not in
17 evidence. And I don't want to assume your state of mind,
18 but it appears you have a good grasp of some of the issues
19 that are involved in the two prior cases in your colloquy
20 with defense counsel.

21 So what I'd like to do, unless Your Honor has any
22 issues with it, is I'd like to talk briefly about why this
23 case isn't like the Green Mountain one and why it's not like
24 Green Mountain three. I'm going to refer to them that way
25 because in some of those cases you have one name on a

1 complaint and another name on the opinion as I recall be it
2 Warchol or Horowitz or Fifield or whatever so I --

3 THE COURT: Well, they are totally different class
4 periods. One is 2010. The other one is 2012. And you're
5 right in the middle, 2011. So you can refer to them as the
6 year I suppose.

7 MR. ROSEN: Well, you know, I think we're the
8 Goldilocks case; not too hot, not too cold, just right.

9 THE COURT: Just right.

10 MR. ROSEN: Just right.

11 THE COURT: That's great.

12 MR. ROSEN: Your Honor, --

13 THE COURT: I never heard that argument before.
14 We are just right.

15 MR. ROSEN: Thank you. I hope Your Honor reaches
16 that conclusion at the end of the process.

17 THE COURT: Right.

18 MR. ROSEN: Your Honor, these cases, although they
19 involve the same corporation, are very, very different. And
20 let me just spend a moment explaining why we think they are
21 different.

22 Case one, the earliest case, the 2010 case I
23 guess, involved a claim of revenue recognition. Our claim
24 in our case Green Mountain two involves a case of inventory.
25 Revenue recognition because it's an accounting concept,

1 obviously there's a serious question, Your Honor was not
2 satisfied that low-level confidential witnesses knew how
3 revenue was being recorded and therefore had a basis for
4 saying that the revenue was improperly recorded.

5 Our case is not an accounting case in that
6 respect. Our case focuses on inventory. And as Your Honor
7 noted in your colloquy with Mr. Bodner a low-level employee
8 on the, on the line, so to speak, can certainly observe
9 massive quantities of inventory piling up to the rafters,
10 massive quantities of inventory being disposed of. That's
11 the first distinction.

12 The second distinction from Green Mountain one in
13 that case there was this very smell of insider selling. And
14 it was, in terms of individuals it was by non-defendant
15 officers or senior leaders. And Your Honor rightly did not
16 attribute insider selling by persons who were not defendants
17 to the individual defendants or the corporation.

18 In our case there's I believe roughly 49 million
19 dollars of inside selling by not low-level people, but by
20 defendants, the CEO and the CFO. And I'll talk more about
21 that at length, but that, that was, as Your Honor's colloquy
22 with Mr. Bodner indicated, that's, A., a very significant
23 amount of money dollar-wise, and, B., the circumstances were
24 very unusual. And I'll be glad to talk about that in a
25 moment.

1 The third distinction is the allegations in our
2 case were in a sense corroborated by the end of the class
3 period because one of the things that happened in our case
4 is that the defendants felt -- defendant, the company, fell
5 short of expected revenue by 50 million dollars and yet it
6 reported a 250 million dollar jump in inventory.

7 Now, think about it for a minute. I'm not a
8 businessman, I've never been a businessman, but if I'm going
9 to have a dollar of revenue presumably it's not going to be
10 based upon a five dollar item being sold for a dollar. I'm
11 going to have some -- the cost of the goods sold, as I
12 learned in the one accounting course I ever took, is going
13 to be some fraction hopefully of that dollar in order for me
14 to have a profit.

15 So it is very difficult for defendants to
16 reconcile a shortfall in the expected revenue of 50 million
17 corresponding to the sudden jump in inventory by 250 --

18 THE COURT: Right. I was actually thinking about
19 it as I asked Mr. Bodner about whether he says that the
20 increase in inventory amount in the fourth quarter was
21 because of the, not reaching the expectation of 105 million
22 dollars, etcetera, in light of the statement that was made
23 by Mr. Blanford at quarter 1 in which he said they are going
24 to try to increase inventory so that they don't have these
25 shortfalls in the future and is that the reason why there

1 was an increased amount in the fourth quarter. Because you
2 made a strong point that, well, this makes no sense, 250
3 million dollars and, in fact, you know, their shortfall was
4 only 50. So that doesn't justify the increase in inventory.

5 Well, the increase in inventory was, in fact, at
6 least in part, if you take literally what Mr. Blanford said
7 in quarter 1, and I'd like you to respond to that, he
8 basically said, you know, we don't want to be in this
9 situation again, we want to start to increase inventory so
10 that we can meet expectations as we go into the next --

11 MR. ROSEN: In the future.

12 THE COURT: Yes.

13 MR. ROSEN: Let me address it this way, Your
14 Honor. There is no problem with increasing production
15 capacity. There's no problem with increasing inventory.
16 The problem is in essence an issue of disclosure. This
17 company was characterized as growth stock. Mr. Bodner and
18 his client justifiably take pride in its high rate of growth
19 which obviously induced the market to a very high
20 appreciation of the stock.

21 During our seven month class, approximately seven
22 or nine month class period, the price of the stock
23 quadrupled. So the market obviously viewed it as a good
24 sign.

25 One of the most obvious metrics for the market

1 viewing a company like this as, it's still a growth company,
2 it's not resulted into a mature company with a much lower
3 growth rate is that inventory is being bought, not only
4 being produced, but is being consumed.

5 So if I were in a business of let's say selling
6 pet rocks and I say I think the business is going to
7 quadruple and therefore I'm going to dig up so many more pet
8 rocks and I think it's going to sell and I say to the market
9 I'll quadruple my supply of pet rocks, I think it's going to
10 sell, that's not a problem. The problem is if it's not
11 selling and I don't tell the market that.

12 And so the issue is they had to not only increase
13 capacity but they had to show the market that the capacity
14 was being absorbed. And you have statements throughout the
15 class period. An example is a statement made in May,
16 May 3rd at a conference call for investors in which they
17 said we're not building any excess inventories at all. That
18 was said by the president of one of the subsidiaries. Not
19 the defendant, but the president of one of the subsidiaries.
20 And that was Paragraph 110 of the complaint.

21 And then one week later the company had its
22 secondary offering and sold nine and a half million shares
23 and raised 81 million dollars.

24 So what we say in effect, when Mr. Bodner or his
25 colleagues say how is this rational, how does the underlying

1 theory of our claim make sense it's this, defendants had a
2 growth company, they represented it to the world as a growth
3 company. And so they decided that they wanted to continue
4 to grow and say we continue to increase capacity. If it
5 sold, great, the company would continue to be profitable and
6 they would have significant profits, but if it didn't sell
7 they would use the announcements about the inventory and the
8 lack of disclosures that it was building up as time to cash
9 out and make very significant profits, as Your Honor noted
10 in your colloquy with my brothers at the bar, about the tens
11 and millions of dollars that were pulled out.

12 So it's sort of a heads I win tails you lose
13 position. Either we're going to build up inventory and sell
14 the inventory and we'll have all the profits. Or in the
15 case of Miss Rathke, she was with the company for nine
16 years, never sold a dollar's worth of stock, all of a sudden
17 says I'm going to take a very significant portion of my
18 holdings and sell them out so I'll gain that way.

19 THE COURT: Just go back a little bit to your
20 reference to that other statement that was made about
21 increasing inventory. It was -- that, frankly, was
22 confusing to me. It was by the head, Stacy --

23 MR. ROSEN: Michelle Stacy I think.

24 THE COURT: Yeah, okay. Michelle Stacy in which
25 she indicated, at least it seemed to me that she was

1 indicating that they were not in fact building up inventory.

2 MR. ROSEN: Correct.

3 THE COURT: That it was being sold right away.

4 And this was at what, quarter 2, is that when she made the
5 statement?

6 MR. ROSEN: It was May 3rd I believe. So it was
7 three months into the class period.

8 THE COURT: Okay. So then is that not, in fact, a
9 statement inconsistent with what Mr. Blanford said at
10 quarter 1 in which he said we're going to try to build up
11 inventory by increasing production so that we can satisfy
12 the, the needs of the future?

13 MR. ROSEN: Well, I interpret them as both being
14 consistent in this sense; in both cases they are saying
15 there is significant demand for our product. The earlier
16 statement by Mr. Blanford said we'll respond to that demand
17 by ramping up production capacity and Miss Stacy saying the
18 flip side of that and all of that capacity is being absorbed
19 because we're not building up any excess inventory.

20 If Mr. Blanford said we're building up capacity
21 and then three months later or some other time during the
22 class period Miss Stacy or anyone else said it's ballooning
23 in the warehouse the market price of the stock would not
24 have quadrupled during the class period as reflected by the
25 very significant drop in stock price at the end.

1 THE COURT: Issue number one, what's the false
2 statement? What are you saying literally is the false
3 representation or omission which is at the heart of your
4 complaint?

5 MR. ROSEN: The false statement in this case is
6 not an income statement, it's not a revenue recognition
7 statement, it is that the, the inventory, the excess
8 inventory is not accumulated. We're saying we are not --

9 THE COURT: So the heart of your fraud is in fact
10 what she said, Michelle Stacy said?

11 MR. ROSEN: The heart of our fraud is the
12 statements throughout the class period in which they said we
13 don't have an excess inventory problem. And --

14 THE COURT: Okay.

15 MR. ROSEN: And what happened toward the end of
16 the class period is there was the Einhorn report. We can
17 debate its significance or lack of significance. I remember
18 when I was in law school -- and defendants say, well, he's a
19 notorious short seller and he has an incentive and I'm sure
20 he does.

21 When I was in law school one day, I didn't have
22 the gray hair I have right now, I was waxing poetic to one
23 of my classmates about the press and what a wonderful job
24 they do preserving our freedoms. And my classmate who was
25 wiser than his years turned to me and said, you think they

1 do that on purpose. And he was right. You know, of course
2 Mr. Rineheart has an incentive. But, nonetheless, the
3 things that he said forced the company to come clean a month
4 later and basically confirmed these statements in the sense
5 that there was, in fact, a mass amount of excess inventory.

6 And between Mr. Einhorn's statement and the
7 disclosures at the end of the class period there was a very
8 substantial drop in the company's stock price.

9 So those are the principal differences.

10 THE COURT: So when you are in your, I just asked
11 you that specific question, what's the false statement. It
12 isn't necessary the literal false statement that
13 Mr. Blanford made in quarter 1 and it is clearly a
14 misstatement that Miss Stacy made because I didn't see that
15 in your pleading.

16 MR. ROSEN: Well, I apologize if I wasn't clear,
17 Your Honor. And I'll accept responsibility for that.

18 THE COURT: Okay. So that comes as a, comes as a
19 little bit of a surprise it's like, well --

20 MR. ROSEN: Well, let me amend that slightly.

21 THE COURT: Because that's the first thrust of
22 their, of their claim. No, no fraudulent statement. And
23 now you are suggesting that when she said that there's no
24 excess capacity, meaning no extra inventory, so that she is
25 essentially representing to would be investors or soon to be

1 investors, you know, we're selling everything that we
2 produce, that is the heart of your fraud claim?

3 MR. ROSEN: That is. And just to modify my
4 comment slightly, Your Honor. When you said there's no
5 false statement at the beginning, you know, cases can be
6 viewed as misrepresentation cases or omission cases and
7 sometimes it's two sides of the same coin.

8 From my perspective if you announce we are
9 embarked or have already embarked on a massive increase in
10 inventory production and you don't say in the next breath
11 and it's filling the warehouses that can be viewed as an
12 omissions case for not having said the second half of that
13 or it can be viewed as a misrepresentation case. But
14 clearly as the class period progressed and they are making
15 statements that we do not have excess capacity, we are
16 solely producing to meet existing needs, I respectfully
17 submit that that's not a complete and truthful statement.

18 THE COURT: So then how, how can you show that Mr.
19 Blanford, when he made that statement, knew that, in fact,
20 the warehouses were being filled?

21 MR. ROSEN: There are, there are at least two
22 answers, Your Honor. Your Honor spoke about the core
23 operations doctrine which in one of Your Honor's prior
24 opinions in, I think it was Green Mountain one.

25 THE COURT: Avoided addressing the issue.

1 MR. ROSEN: Well, as I recall Your Honor saying,
2 Second Circuit has not resolved whether it's still viable
3 doctrine, but both sides, at least in that case, or
4 presumably the defendants in our case, agreed that it's a
5 factor to be considered.

6 So that obviously ties also into Miss Rathke and
7 Mr. Blanford's responsibilities in light of the change in
8 the inventory controls and all that issue. So it's clearly
9 something that ought to have been in front of them.

10 Certainly when, as we've alleged, so many
11 different confidential witnesses at so many different
12 locations saw the massive build up in inventory. That is
13 certainly a basis for it.

14 THE COURT: But I thought the person who started
15 talking about the warehouses being overflowing --

16 MR. ROSEN: Correct.

17 THE COURT: -- was CW2 I think it was.

18 MR. ROSEN: Your Honor, I'm sorry, I've reached
19 the point in my life where I can't remember one versus
20 another. But I certainly --

21 THE COURT: Well, I'll tell you in a second
22 because I wrote it down.

23 MR. ROSEN: Thank you, Your Honor.

24 THE COURT: Yup.

25 MR. ROSEN: But there's a second part of my

1 response to Your Honor's question.

2 THE COURT: The point was that this didn't, I
3 guess it was CW1. The machinery was bought in 2010 and then
4 production began to increase. So it was in 2011 when all of
5 a sudden you start to see more and more inventory. In fact,
6 that's the, that's consistent with the statistics of the
7 inventory. It begins to build in 2011. Is there any
8 indication that somebody spoke to Mr. Blanford or
9 Miss Rathke and told them, you know, we're building up
10 inventory here?

11 MR. ROSEN: Your Honor, if the question is do I
12 have an informant who is Mr. Blanford's executive assistant
13 or his golfing partner the answer is no. If the question is
14 did they have access to information, and that's, as I
15 understand it, the defendants used that line in their brief.
16 And it caught my attention because that, in fact, is the
17 standard in The Second Circuit. Know or have access to
18 information. They clearly had access to information about
19 the inventory situation.

20 The second half of my answer to Your Honor's prior
21 question about how did they know is the metrics issue. We
22 talk not just about the 50 million shortfall in sales
23 resulting in 250 million excess of inventory, which as I
24 respect, would respectfully suggest I would suggest they
25 were either very bad businessmen and businesswomen if they

1 were planning on selling five dollars of inventory for one
2 dollar in sales that they didn't make or that the numbers
3 don't make sense. But the other metrics we talked about are
4 talking about the turn over ratio and the average case to
5 sell. We set forth those in the complaint. And we showed
6 how the trend in both of those calculations is inconsistent
7 with their representations that they were not building up
8 excess inventory.

9 In short, and I'm not an accountant, but in short
10 what they are saying is if you are constrained in terms of
11 your inventory and it's not building up the average days to
12 sell should not be going up. And, in fact, they were.

13 And if you're constrained in your inventory and
14 it's, and you don't have excess inventory your inventory
15 turn over ratio should be going down. And it went, you
16 know, or -- so those two things are off.

17 So between 50 versus 250 million, the inventory
18 turn over ratio and the days to sell ratio, all those
19 indicate that it doesn't make sense. You add in Miss Rathke
20 and Mr. Blanford's responsibilities in light of the prior
21 restatement and you add in the core operations doctrine,
22 this obviously was a core factor to the company.

23 I mean this is a company that sells K-Cups more
24 than anything else. And let me just make the record clear.
25 There's nothing wrong with K-Cups and there's nothing wrong

1 with Keurig machines. I have one in my home. I have one in
2 my office. And I use one or the other almost every day and
3 I'm very grateful for it. But it's a question about
4 misrepresentations about inventory.

5 But let me just spend a moment explaining why we
6 don't think this is like Green Mountain three as well.
7 Green Mountain three -- as I said Green Mountain one was a
8 revenue recognition case. Green Mountain three was a
9 forward looking statement case. Mr. Bodner correctly
10 pointed out that that's governed by the safe harbor
11 provisions of the PSLRA and Your Honor concluded they had
12 given appropriate warnings.

13 THE COURT: And that was the heart of the
14 decision. You're right.

15 MR. ROSEN: Our case involves false statements of
16 present fact. Not false projections.

17 And another significant factor that bedeviled the
18 plaintiffs in that case is they had only three confidential
19 witnesses. At least two of them had left the company two
20 years before the class period. And Your Honor correctly
21 said how can I infer that someone who left the company in
22 2010 knows what was going on in 2012.

23 Now, on the issue of candor we had one, perhaps
24 two of our nine confidential witnesses who had left the
25 employ of either Green Mountain or MBlock, the inventory

1 fulfillment company, before the class period.

2 THE COURT: Yeah, but one of your primary ones. I
3 mean I thought you had 10. I thought there were two who
4 held management kinds of positions.

5 MR. ROSEN: Right.

6 THE COURT: CW8 was I thought the most significant
7 witness that you had. And I thought it was a woman and she
8 left in 2010. And then --

9 MR. ROSEN: Well, Your Honor, --

10 THE COURT: -- you know, maybe I'm getting
11 confused about cases. They all sort of blend together. But
12 she, you know, clearly said that she had a conversation with
13 someone who was also still present at Green Mountain and
14 they hadn't changed their inventory controls.

15 MR. ROSEN: Correct. Correct. And in terms of
16 whether it was a man or a woman all I can tell Your Honor is
17 when we drafted the complaint we had real names and we took
18 them out and put in the CW, CW1, CW2. I made sure in the
19 drafting process we never indicated gender because I didn't
20 want to do anything further on it. So my memory is it's
21 like you turn off the computer the memory bank clears. I
22 don't remember which ones were men and which ones were
23 women.

24 THE COURT: It's not important. CW8, wasn't CW8
25 somebody who was, who really was the only person who could

1 actually talk about the methods of inventory control and,
2 but she was gone by the middle of 2010?

3 MR. ROSEN: I believe Your Honor is correct, but
4 when I, before I retire from the podium I would just confer
5 with my counsel to see if they have a better memory.

6 The third big difference between Green Mountain
7 three and our case is the trading plan adopted in Green
8 Mountain three had been adopted before the start of the
9 class period. We provided Your Honor with citation to
10 authorities that said adopting a trading plan during the
11 class period is not a defense. In fact, it gives rise to
12 some basis for scienter precisely for that issue.

13 And there's another issue about trading plans I
14 wanted to make before I forgot because I've got a lot on my
15 plate here. The regulation itself that adopts 10B 5 dash 1
16 plans specifically references that one of the elements to a
17 10B 5-1 plan as a defense is the party's good faith.

18 And we cited to Your Honor in our brief, and I
19 would be glad to give Your Honor those citations if needed,
20 the fact that good faith is a factual question. And for
21 that reason I respectfully submit that Your Honor may have
22 overstepped where you should have been in the prior case in
23 granting a dismissal on the adoption of a 10B 5 plan at the
24 motion to dismiss stage. It's an affirmative defense.

25 And one of the concerns I have in this case Your

1 Honor noted PSLRA is sort of a weird duck and it's unlike
2 other motions to dismiss. And in Your Honor's colloquy with
3 Mr. Bodner you asked what about this fact, what about that
4 fact. And I would respectfully suggest Your Honor that they
5 are sort of putting Your Honor at risk of creating errors by
6 going beyond the record.

7 They can certainly cite to public filings to say
8 this is what was disclosed to the market. They cannot cite
9 the public filings as proof of what they are saying.

10 And that's what they did in their discussion of
11 how many, how much space would be taken up by half a million
12 brewers.

13 Also they -- Your Honor can't be asked to accept
14 factual assertions in the brief. So the individual
15 defendant's reply brief at one point said plaintiffs
16 overlooked the many innocent reasons why Rathke did not sell
17 her stock earlier including she was focused on her
18 responsibilities at Green Mountain. And that was at Page 14
19 footnote 9, 19 of their reply brief. They can't do that,
20 Your Honor.

21 I remember years ago hearing a comedian talking
22 about how he had a near death experience and his life
23 flashed in front of him. And it wasn't until a moment later
24 he realized it was the wrong life. And that's sort of how I
25 feel right here in this situation.

1 THE COURT: Wrong life or wrong wife?

2 MR. ROSEN: Your Honor, I have to go home in two
3 days so I would plead the Fifth Amendment on that.

4 THE COURT: Well, that's, so that, you are
5 absolutely correct. I'm sensitive to trying to, to figure
6 out what facts actually can be relied upon.

7 MR. ROSEN: Correct.

8 THE COURT: And of course the defendants said that
9 if you take a look at the complaint you see the documents
10 that were relied upon in the, in the complaint essentially
11 adopted by reference or at least relied upon in some
12 significant way then those facts are a part of the
13 complaint, you can rely upon them. It's a delicate line.

14 MR. ROSEN: Right. And to tell the back story of
15 that doctrine, Your Honor, there was a time when some
16 plaintiffs would file a complaint that misleadingly quoted
17 from a passage in a securities filing. And the defendants
18 would want to quote the other passage in the securities
19 filing that told the rest of the story. And plaintiff's
20 counsel said, no, you can't consider it.

21 And the Courts starting I guess with The Second
22 Circuit, which is another court of securities litigation in
23 general said, no, you can't do that. If you quote Page 1 of
24 the 10K they can quote Page 20 of the 10K. That's the
25 doctrine as I understand it. But you can't quote Page 20 in

1 the 10K to establish the truth of what's written on Page 20.
2 You can only show this is what the market knew or was told
3 in the 10K. And that's, that's a problem that they have.

4 And that leads me to a more general sense that
5 much of what is --

6 THE COURT: But that does sound like it's more of
7 a hearsay.

8 MR. ROSEN: Well, it's not just hearsay. You
9 know, the first part of the 10K is hearsay too. What it
10 really relates to is there are factual issues present here.
11 There's a factual issue as to was the trading plan adopted
12 in good faith. There's a factual issue in terms of, you
13 know, what happened with the brewers, things like that, that
14 require the development of a factual record. And that makes
15 it -- Mr. Bodner may very well prevail on a summary judgment
16 motion, but that's not what we're here for today. What
17 we're here for is a motion to dismiss. And I would
18 respectfully suggest that they haven't met that requirement.

19 Now, one point that's significant, Your Honor, and
20 defendants really don't have an answer to as I heard
21 Mr. Bodner and his colleague, I apologize, I forgot his
22 name.

23 THE COURT: Mr. Byrne.

24 MR. ROSEN: Mr. Byrne. And as I read their four
25 briefs, their opening briefs and their reply briefs, is they

1 don't really give any explanation for hiding inventory. We
2 have alleged that they taped off areas of the warehouses
3 where the auditors could not go, let me turn back to that in
4 a second to address the auditor's role in this, and that
5 they shipped it around the corner to N. block and back to
6 California and back, all those things, to keep the inventory
7 from being counted. That's the essence of our case.

8 They didn't want to report the actual ballooning
9 of inventory. They made statements to the opposite, that
10 inventory had not ballooned. That it, you know, they were
11 just, you know, they were just up to their nose in terms of
12 the water.

13 If they said that that wasn't the situation the
14 market would have responded appropriately. And I
15 respectfully submit the price wouldn't have quadrupled in
16 those seven months.

17 There is no -- Your Honor under the various cases,
18 including Tellabs, has to decide what's a more -- what's a
19 reasonable inference. The standard isn't it is proven, the
20 standard isn't, is not is it more likely that the inference
21 is in favor of the plaintiffs or in favor of the defendants.
22 All we need to show is it's equally likely. And as a number
23 of courts have said, and I appreciate this articulation as I
24 think of my favorite sport baseball, tie goes to the runner.

25 In other words, if the Court, and I've actually

1 been in situations where the Court said plaintiff's
2 inference, defendant's inference equally likely therefore
3 the case is sustained. And that's all we need to show. We
4 don't need to disprove their so-called innocent
5 interpretation. All we need to say is it is likely.

6 And given the metrics, given the 50 million
7 shortfall in revenue and the 250 million build up in
8 inventory, given their ratios that I outlined earlier, the
9 days to sell and the other it's simply, in our opinion, at
10 least equally likely that what they were doing is they were
11 building up inventory, they increased capacity, which is
12 fine, they were building substantial inventory, which is
13 fine, but it was piling up and they didn't disclose that and
14 that's what's not fine.

15 THE COURT: Well, all right. So the concern, one
16 of the concerns that I had in regard to reviewing your
17 reports from your confidential witnesses --

18 MR. ROSEN: Yes, Your Honor.

19 THE COURT: -- is the timeframe. And there was
20 one that, that by implication suggested it must be 2011. I
21 think that's CW1. But the others talked about things
22 happening, you know, things being taken outside and run
23 around the block when the auditor arrives or even suggested
24 that something from N. block went to California and then
25 back.

1 MR. ROSEN: Right.

2 THE COURT: There's no time reference, there's no
3 timeframe. I mean is this within the class period? I, I
4 will say that I agree with you completely that this is a
5 totally different case than in 2010 and 2012. Totally
6 different issues.

7 There have been some findings that I made which
8 are relevant, for instance, in regard to Ms. Rathke's stock
9 or Mr. Blanford's stock. I made that determination that
10 you, that you consider stock options. That's the law now in
11 this circuit, but, or this district. But generally speaking
12 I think it's totally, they are totally separate causes of
13 action. But you've got to show that these kinds of things
14 were happening in 2011 as you begin to build this inventory
15 or are you just relying upon the fact that the inventory
16 went from what, let's see, 269,000 in quarter 1 to 672,000
17 in quarter 4?

18 MR. ROSEN: Let me answer that in two parts. With
19 respect to considering options, I just want to address that
20 now so I don't forget, Your Honor did rule in one of the
21 prior cases, or maybe both the prior cases, it blurs in my
22 mind as well, that the Court should consider both the stock
23 and the options in looking at what is the percentage of a
24 defendant's holdings that were sold.

25 We respectfully suggest that Your Honor should

1 only consider stock. But even if Your Honor wants to
2 consider options we respectfully suggest the Court should
3 only consider vested options because the purpose of looking
4 at the percent of stock, of holdings that a party sells,
5 whether it's stock or stock and options, is the Court is
6 making some sort of judgment based upon what percentage of
7 what they could have sold did they sell. Because they want
8 to say it is a small number. And we obviously want to say
9 it's a big number because at some point it's a big enough
10 number that becomes one of the factors the Court considers
11 in inferring scienter.

12 If it's an unvested option they couldn't have sold
13 it anyway. So I would respectfully suggest that that's
14 where defendants led Your Honor one step too far out on the
15 branch. And Your Honor, respectfully, and I mean this in
16 all sincerity, should only at most count vested options
17 because if I have unvested options that I've got, I wish I
18 did, I respectfully submit it tells you nothing.

19 So I think you should only count vested options at
20 most. If you do that it shows Miss Rathke sold 38 percent
21 of her holdings and Mr. Blanford sold 18 percent of his
22 holdings.

23 We cited, Your Honor, authorities in our brief,
24 and I'm sure Your Honor's law clerk can easily pull them up,
25 that said as low as 11 percent sales by a defendant can

1 support an inference of scienter. Certainly when you are in
2 the neighborhood of 38 percent you can.

3 Now, they cited cases that say you don't --

4 THE COURT: But you do agree though when you are
5 making that analysis the motive and opportunity you look at
6 all of the facts and surrounding circumstances and one of
7 the things that seems to be relevant in regard to
8 Miss Rathke is that a large percentage of the, of the
9 options and stock that she sold was from as early as 2003
10 and were soon to expire in 2013, which is a few years down
11 the road.

12 MR. ROSEN: That's two years away, Your Honor.

13 And --

14 THE COURT: Right. But, --

15 MR. ROSEN: If you had inside information and you
16 want to sell your securities you have two choices as I
17 understand the law. You either disclose, wait for the
18 market to absorb that information and then sell or you have
19 to hold onto your securities and not sell.

20 In 2011 Miss Rathke -- no one put a gun to Miss
21 Rathke's head and said sell 32 million dollars worth of
22 options and stock, none of which will mature in less than
23 two years. She could have gone to Mr. Blanford or gone to
24 the board and said I think we should disclose this build up
25 in inventory, the market would have done what the market

1 would have done and then no one could have criticized her.
2 But instead we respectfully submit that defendants adopted
3 the 10B 5-1 plan not in good faith, but precisely because
4 they had a situation where inventory was building up and
5 they wanted to take their chance to try and cash into a
6 substantial matter.

7 The fact that she didn't sell anything for nine
8 years does not excuse her from selling now. And they say,
9 gee, they had very sensitive transactions and there were,
10 you know, periods where they couldn't trade.

11 We attached to our brief, the one brief we filed,
12 the declaration from my colleague Mr. Browne, which attached
13 the various securities disclosures from other senior
14 executives showing that during various times during that
15 past eight or 10 year period, whatever it was, they sold.

16 So, again, maybe they'll come back and say
17 Miss Rathke had access to certain information that no one
18 else did, but that's a factual issue that needs to be --
19 that needs to be developed and we need to be able to probe
20 it to precisely determine whether in fact they can show the
21 good faith that the regulation 10B 5 dash 1 calls for. I
22 don't know if that answers your question. I've gone on a
23 bit about that.

24 THE COURT: I just want to go back to the initial
25 question I asked you about, the false statement.

1 MR. ROSEN: Yes, Your Honor.

2 THE COURT: And you're using Michelle Stacy.

3 MR. ROSEN: Yes. Among others.

4 THE COURT: But I, and I did not see that in, in
5 your pleadings. Did I miss it or was it not there and now
6 it's there?

7 MR. ROSEN: Your Honor, can I confer with my
8 colleagues for a moment?

9 THE COURT: Sure.

10 MR. ROSEN: Your Honor, as an example I'm looking
11 at our consolidated complaint, corrected complaint I should
12 say because we had made some errors in filing. And the
13 defendants were kind enough to let us file a corrected
14 complaint. Looking at Page 43, Paragraph 105 we're talking
15 at the beginning of the class period, February 2nd, 2011.

16 The company held a conference call. And at that
17 conference call Mr. Blanford said, demand is definitely
18 stretching our ability to supply. So that's at the very
19 beginning of the class period. We then quote the conference
20 call.

21 THE COURT: And I thought that that's what you
22 were relying on.

23 MR. ROSEN: We are. We are.

24 THE COURT: I thought, I thought you, I thought
25 that your theory was that this was essentially a plan to

1 show that Green Mountain Coffee Roasters was stretched to
2 the limit and was going to really be producing more
3 inventory, the production figures would go up and that this
4 is an extremely successful business and as a result the
5 inventory was going to remain relatively constant. And the
6 fact is that they knew that ultimately at the fourth quarter
7 after, in particular Mr. Einhorn's speech --

8 MR. ROSEN: Right.

9 THE COURT: -- that it would be disclosed. And
10 then all of a sudden they disclosed the fact they had built
11 up all this inventory when in fact they had never sold it.
12 And I thought this was a plan related to Mr. Blanford and
13 Miss Rathke in particular. I didn't know that you were
14 actually relying, at least in part, upon Miss Stacy's
15 statement, which I thought to be inconsistent with the
16 statement that, that basically Mr. Blanford made in quarter
17 1 in which she said there's no, there's going to be no build
18 up here, we're selling everything we can possibly make.

19 MR. ROSEN: Well, I think they are consistent.
20 They are all sending a uniform message that demand is very
21 high and we can sell all we make basically. And the proof
22 of that is that inventory is not building up.

23 THE COURT: I thought that --

24 MR. ROSEN: There's that -- remember that line
25 from the movie, another baseball movie, if you build it they

1 will come, they are saying if we make it they will come.

2 THE COURT: You have to be careful. Whenever you
3 bring up that movie I start to cry. So I start to think
4 about playing baseball with my father. And, I'm sorry, it
5 gets very emotional.

6 MR. ROSEN: Your Honor, I'm a 1964 Phillies fan.
7 When they were 11 games out, they were leading the entire
8 season, Jim Bunning was one of their star pitchers before he
9 became a senator. And they had 11 games left to the end of
10 the season. And they would only lose the pennant if they
11 lost 10 of the last 11 games. And they lost 10 of the last
12 11 games and the Cardinals won the pennant and it broke my
13 heart. And if I ever met Your Honor in a tavern I could
14 recite the entire lineup of the '64 Phillies.

15 THE COURT: I can tell you a lot about Brooklyn,
16 it goes to show you our relative ages, the Brooklyn Dodgers
17 in 1955.

18 Anyway, regardless. I'm looking at the quote
19 actually. Let me see if I've got it here. From Mr.
20 Blanford quarter 1 in which he said, there's stretch -- the
21 demand is definitely stretching our ability to supply.
22 We're not quite caught up with that demand curve. In quote,
23 we are hoping to build a little bit of a cushion going
24 forward.

25 Now, I thought that was the clear intention that

1 was expressed by him. And that is inconsistent with someone
2 who says, oh, no, we're selling everything that we've
3 produced and there's no build up.

4 MR. ROSEN: The way I interpret that, Your Honor,
5 and I'm not a psychoanalyst, but the way I interpret that is
6 we need to increase capacity and we need to increase
7 inventory because we don't have enough inventory to meet
8 existing demand and foreseeable demand.

9 And Miss Stacy, when she was saying, the comment I
10 quoted from May is in a sense a similar comment. They are
11 both sending the message to the market this is still a high
12 growth company, an extremely high growth company.

13 THE COURT: Well, that I agree with. Can I just
14 ask you another question? You are putting in your brief
15 some reference to some of the production facilities as being
16 only 60 percent, producing at a rate of 60 percent to
17 70 percent or whatever.

18 MR. ROSEN: Right.

19 THE COURT: Isn't that irrelevant? I mean that's
20 not your claim. Your claim is that there --

21 MR. ROSEN: No, the claim isn't that -- we're not
22 claiming that they represented to every single production
23 facility it wasn't 100 percent and if wasn't 98 percent it's
24 fraud. What I'm saying the fact that they were producing so
25 much less than their capacity was inconsistent with their

1 reputation that the water was up to the top of their nose.

2 And the representation that they needed every drop
3 of inventory that they could get to meet demand and yet they
4 are not, in fact, producing all the inventory they can make
5 the two are respectfully mutually inconsistent as I
6 interpret them. Your Honor may, of course, make a
7 different --

8 THE COURT: So what you are just basically saying
9 is they keep talking about being stressed to the limit.

10 MR. ROSEN: Right.

11 THE COURT: And, in fact, they are not stressed to
12 the limit. And, but I, well --

13 MR. ROSEN: Yeah. That, that put it better than I
14 could, Your Honor.

15 THE COURT: I don't exactly see how that fits into
16 your claim in regard to the oversupply of inventory which is
17 ultimately the cause of the problem according to you.

18 MR. ROSEN: And the oversupply of inventory is the
19 disproof of the suggestion they made repeatedly that they
20 are stressed to the limit.

21 THE COURT: Okay. So this is more just a vague
22 impeachment about their claim and it's nothing related to
23 your allegation? In other words, you've got no claim
24 related to the fact that they are not using all of the
25 machinery that they have.

1 MR. ROSEN: Correct. Correct. Our claim, again
2 as I said at the beginning of my colloquy with Your Honor,
3 it's not a revenue recognition claim. It's not a forward
4 looking statement claim. It's you're telling the market
5 about inventory. And the statements they are making to the
6 market about inventory during the class period respectfully
7 simply are not credible. And given the balance of
8 inferences Your Honor is to make under Tellabs it is at
9 least equally likely, and I would respectfully submit, more
10 likely, that the repeated statements about inventory is so
11 high, inventory is barely meeting capacity is inconsistent.

12 One way of explaining, and I promise this will be
13 my last baseball analogy, if a baseball team, God willing my
14 favorite Philadelphia Phillies were publicly owned, but the
15 daily results of the games were secret, management of the
16 Phillies couldn't say we're in contention, we're in
17 contention, we're in contention and on September 15th say
18 we're 20 games out of first place.

19 And in essence that's what happened here. They
20 were saying we're in contention, we're in contention, we're
21 in contention, we're, you know, we're grinding it out, the
22 inventory is not excessive, the inventory is not excessive
23 and then all of a sudden we have 250 million of excess
24 inventory. That's simply inconsistent.

25 THE COURT: That again is then, that's your claim

1 because what you're saying is inventory is not excessive
2 when, in fact, the claim that you, I thought, made in the
3 complaint is that Mr. Blanford misrepresented the whole
4 plan. He, in fact, was saying we need to increase inventory
5 and that's what he's saying in quarter 1.

6 MR. ROSEN: Right.

7 THE COURT: What you're focusing more on now is
8 Michelle Stacy. And I'm wondering whether that's in the
9 complaint.

10 MR. ROSEN: Your Honor, I didn't memorize the
11 complaint. I'll be glad to check it. I would certainly be
12 glad to amend it if I failed to allege it. I'll certainly
13 plead guilty to mistakes in the complaint.

14 I know we referred at one point to Mr. Wettstein
15 as Mr. Weinstein. And that was a mistake too. And I
16 apologize to Mr. Wettstein and the company. I of all people
17 should know that. I apologize, Your Honor.

18 Your Honor, my colleague Mr. Browne pointed me to
19 Paragraph 110 on Page 45 of the corrected complaint which
20 refers to Miss Stacy's saying, we did not pull forward any
21 sales at all. We fill our customer orders as they come in
22 and they were not building any excess, any excessive
23 inventories at all at retail. So that is in the complaint.
24 I apologize if I misled Your Honor.

25 THE COURT: All right. Well, I guess is that the

1 gravamen of your complaint?

2 MR. ROSEN: That's one I articulate, Your Honor.

3 THE COURT: Okay.

4 MR. ROSEN: Your Honor, there are a number of
5 other points I'd be glad to address if Your Honor has
6 questions about them.

7 THE COURT: No.

8 MR. ROSEN: Let me just talk briefly about a
9 couple of them. I think the timing of the sales by the
10 defendants, especially with respect to Miss Rathke and Mr.
11 Blanford, they obviously are two defendants, the fact that
12 they adopted the plan and immediately followed it with the
13 secondary offering of stock, all that, we respectfully
14 suggest, undercuts the position that it is somehow a good
15 defense and, in fact, it's an issue as to good faith.

16 In terms of the defendant's recklessness, which as
17 Your Honor knows is sufficient for scienter, we plead, and
18 Your Honor pointed out in your colloquy with Mr. Bodner, the
19 involvement of the defendants with inventory as it related
20 to the prior restatement and the remedial plan.

21 And we quote in the complaint where the executives
22 were regularly speaking to investors about this topic. It
23 was obviously important to the company. And, you know, we
24 respectfully submit, an example is the Institutional
25 Investors versus Avaya case, a Third Circuit case, where the

1 Third Circuit in this respect makes it harder to plead
2 scienter than the Second Circuit.

3 The Third Circuit does not recognize motive and
4 opportunity. The Second Circuit obviously does. That you
5 raised a strong inference of scienter when the defendants
6 had access to information showing the statements were false.
7 And we obviously respectfully suggest that they did.

8 There's one other point that I would like to
9 address because we've said it in our brief, but it hasn't
10 been discussed so far, which is pursuant to The Second
11 Circuit's decision in Dynex, Dynex was the defendant, but
12 that's out. Another Court could just trade as, people tend
13 to refer to cases by the name of the defendant not by the
14 name of the plaintiff.

15 Just as all these cases are referred to in the
16 vernacular as Green Mountain case and not Horowitz or
17 whatever.

18 Under the Dynex case and under the Public,
19 Pennsylvania Public School Employee's Retirement Systems
20 case versus Bank of America, where I'm the lead counsel
21 currently, pending before Your Honor's colleague in the
22 Southern District of New York, Judge Pauley, the Courts have
23 recognized that Your Honor can find scienter on behalf of a
24 corporate defendant even if Your Honor concludes no
25 individual defendant scienter has been established.

1 And just as appropriate, you know, I don't want to
2 get into politics are corporations people, the current law
3 obviously says they are people, but in this sense they are
4 chargeable with the knowledge of their various agents
5 including, but not limited to, the officers and the
6 defendants. They are chargeable with knowledge of people
7 who are not defendants.

8 And even if Your Honor concludes that Ms. Rathke,
9 Mr. Blanford or both of them have not, we have not
10 adequately plead Scienters to them Your Honor can look at
11 the other allegations as to inventory build up, as to how
12 pervasive it was, as to all the confidential witnesses,
13 communications with Wettstein, Mr. Holly and the others,
14 that corporate scienter has been plead.

15 So that remains an option for Your Honor even if
16 Your Honor decides that the claim against those two
17 individuals should be dismissed. I could ramble on but --

18 THE COURT: Well, how about then how does that
19 translate to false statement? How does that transfer to
20 that first burden that you have, and that is to show that
21 the statement was false and was knowingly made?

22 MR. ROSEN: Let me answer that this way, Your
23 Honor. If every statement was made by someone in investor
24 relations, and let's assume for purpose of discussion, this
25 is unfair to investor relations personnel, they know

1 nothing, they are simply like press secretaries you wind up
2 and you say go out and read this statement. And there's
3 another group of people that know the fact and they are not
4 talking. There's one person who is making the statements
5 and knows nothing. The other people who know the facts and
6 say nothing that collectively, for the purpose of the
7 corporation, can make out scienter. That's what Judge
8 Pauley held in the Bank of America case.

9 THE COURT: So when Michelle Stacy makes a
10 statement that there is no inventory build up, no inventory
11 excess, they are selling everything, we're selling
12 everything that, that we are producing when, in fact,
13 there's somebody out there in the corporation who knows that
14 there's an inventory build up and that it's hitting the
15 rafters of various warehouses, is she then knowingly making
16 the statement when, in fact, she doesn't know anything about
17 it?

18 MR. ROSEN: The answer is she is not, but the
19 corporation is. If the corporation is the person, which was
20 settled by the Supreme Court in the 1860's, the post civil
21 war cases, slaughterhouse case I guess, if the corporation
22 is a person, which it is, and the corporation's agents make
23 a statement, and other personnel at the corporation know
24 that statement is false, she can have a pure heart and an
25 empty head and it doesn't look bad.

1 You know, one, one half could know, the other half
2 to speak, that supports scienter as to the corporation. It
3 doesn't support it as to Miss Rathke or Mr. Blanford, but
4 for the corporation it does. I just wanted to point that
5 out to Your Honor if that's where Your Honor is headed. I'm
6 not saying it should be, but I just wanted to underscore
7 that it's not an all or nothing proposition.

8 THE COURT: Well, that's, that is a, that seems to
9 me I would really be willing to consider that, but that
10 seems to me to be a pretty unique approach to the word
11 knowingly.

12 I mean the obligation is to show that there was a
13 false statement, there was a false statement made and it was
14 made knowingly with a fraudulent intent. Fraudulent intent
15 refers, I would think, to the speaker, the person who spoke.

16 To say that the speaker here can have an empty
17 head and is essentially a vessel for all of the information
18 that the corporation has and so that you have to say she
19 knows everything about the corporation when she makes that
20 statement, which may be totally inconsistent with what she
21 knew. That, do you have some case law to suggest that
22 scienter is that broad?

23 MR. ROSEN: Well, the PPERS case, Pennsylvania
24 Public Employee's Retirement System versus Bank of America,
25 in that case, and it's still going on, in the initial motion

1 to dismiss the judge dismissed all the individuals and kept
2 in the corporation. It is not unheard of. And The Second
3 Circuit --

4 THE COURT: Well, I'm sure that that's correct. I
5 mean I, I know that that's correct. But that doesn't
6 necessarily say that the speaker, whoever the speaker was,
7 necessarily knew everything that the corporation, that all
8 of the members of the corporation knew.

9 I mean what that suggests is you may not have a
10 claim against any individual speaker, but you got a claim
11 against the corporation.

12 MR. ROSEN: It does, Your Honor.

13 THE COURT: And that's, that's true. That's
14 absolutely true. That's absolutely true. But that doesn't
15 mean that necessarily when you're talking about fraudulent
16 intent as a speaker makes a statement that that speaker
17 didn't know that that statement was wrong.

18 MR. ROSEN: Well, in the absence of that statement
19 how can a corporation ever have any intention because
20 corporations are made up of individuals. And as I said when
21 I started this discussion corporations -- if that were not
22 the rule the corporation could hire as a press secretary a
23 22 year old straight out of college who is told go out and
24 read this statement to the investors, go out and be
25 interviewed on this or that. And people back at the office

1 know that's not true, if that, if that were not the rule
2 then there would be no liability.

3 And, again, we're not excusing Miss Stacy of
4 wrongdoing. We never sued Miss Stacy. Just as, and I did
5 point this out, we never sued Mr. Stiller. The claim
6 against Mr. Stiller in Green Mountain three, he was the
7 chairman, the founder of the company, God bless him,
8 chairman of the board, all well and good for him, but he
9 engaged in inappropriate conduct in the eyes of the Green
10 Mountain board when he made his 66 million dollar share sale
11 of stock, terminated as a board member and chairman the next
12 day.

13 And so the defendants are saying I think
14 rightfully we're not responsible for his conduct, don't
15 infer scienter about us based on in effect a rogue
16 character. But in the case of someone who speaks for the
17 company, and when Miss Stacy is speaking at a conference
18 call for investors, she is speaking for the company with,
19 I'm sure, Miss Rathke and Mr. Blanford in the room when
20 she's having that conversation. Then the company certainly
21 is chargeable with that knowledge, chargeable with the
22 falsity of that if Miss Blanford and Mr. Rathke or others
23 such as Mr. Wettstein and Mr. Holly or other senior leaders
24 know that is false.

25 I don't think we need to get into a debate, Your

1 Honor, that whether if somebody on the line knows it's false
2 and no one else does, if there's a rogue employee who is,
3 who says we're building up inventory but nobody knows but
4 me, I'm looking it in the closet, an argument could be made
5 in that case don't attribute the rogue employee sitting
6 there never sending the inventory, burying it in the
7 backyard, whatever he's doing, that that's not chargeable to
8 the corporation.

9 But we're not talking about rogue employees. Miss
10 Stacy is a senior officer of the company otherwise she would
11 not be on the phone-call for a conference call for
12 investors. And when you have that scienter can be found
13 when she speaks and someone else knows. And that's what I
14 respectfully suggest, Your Honor.

15 Your Honor, I could ramble on. I think Your Honor
16 has a good grasp of it. I'd be glad to answer any questions
17 you have.

18 THE COURT: I think that's fine.

19 MR. ROSEN: Thank you very much, Your Honor.

20 THE COURT: All right. Can I get a reply?

21 MR. BODNER: Yes, Your Honor. A lot of talk about
22 Miss Stacy, let me address that. Again, it's interesting to
23 hear and confirm that they are not saying that any of the
24 reported numbers in the financial statements, they are not
25 challenging that. So that's out of the case. Glad to hear

1 it because, Your Honor, the one point you made about
2 inventory staying constant, in fact, quite the opposite. As
3 was disclosed during the class period inventory is
4 consistent with what Mr. Blanford said built and were
5 disclosed as building over the course of the class period.
6 That was sort of the point. And it was disclosed. So let's
7 put that to the side. But now --

8 THE COURT: So after each quarter you disclose the
9 fact that the inventory increased from what, 279 to 3 --

10 MR. BODNER: To 400 something to 600 in Q4.

11 THE COURT: That was all disclosed?

12 MR. BODNER: So it was at least a couple hundred
13 build in the inventory disclosed quarter by quarter over the
14 period of the class period. But this is -- and what the
15 plaintiffs say is, okay, we're not challenging the numbers
16 and what was disclosed and when they were disclosed. They
17 are saying, to quote Mr. Rosen, the heart of the complaint
18 is we don't have an excess inventory problem and then when
19 pressed he referred to the Michelle Stacy statement in Q2.

20 THE COURT: He said that that was false.

21 MR. BODNER: And said that was false. But, Your
22 Honor, and even Mr. Rosen I think would agree I'm not
23 leading you astray by getting into what's in the record for
24 you to consider because Mr. Rosen said that the very genesis
25 of the doctrine looking beyond the complaint is plaintiffs

1 lawyers in the old days before PSLRA would cherry pick a
2 statement and not give the full statement. And the Second
3 Circuit said, well, that's not fair pool, baseball,
4 football, whatever sport analogy you want to use, you need
5 to put the full statement before the Court.

6 We have put the full statement before the Court
7 that what Miss Stacy really said. And then I will show why
8 that is absolutely consistent, completely consistent with
9 what Mr. Blanford said in Q1.

10 THE COURT: Well, first of all, did you see much
11 in the pleadings from the plaintiff that they were focused
12 so closely upon Miss Stacy's statement?

13 MR. BODNER: What I saw is that they utterly
14 cherry picked and, frankly, mis-portrayed what she said. I
15 did notice that. And what this Court can take into
16 consideration is that what, what they allege Miss Stacy said
17 in, and they have the right paragraph, 110 in the complaint,
18 that needs to be put in context. We've actually done that
19 in our brief. But there, you know, there are so much
20 briefing here points can get lost.

21 So let me laser in on that particular point. In
22 the Q2 earnings call, and this is at 80-20 in the docket for
23 the Court to consider, and it's the earnings call for Q2.
24 And I'm going to read it, but the highlight is what she's
25 being asked about and what she's answering about are

1 brewers. And I'll get to why that's important. But the
2 question by an analyst was to Miss Stacy, whose in charge of
3 the Keurig unit, they are the people who produce the brewers
4 as opposed to CSBU, the coffee unit that's head quartered up
5 -- and the brewers are headquartered, division is down in
6 Massachusetts. The coffee K-Cup division is up here in
7 Vermont. She runs the brewer part of the business.

8 THE COURT: So what you are suggesting is apples
9 and oranges?

10 MR. BODNER: Apples and --

11 THE COURT: The inventory figures of the, going
12 from 269 to 672 are essentially mostly coffee I assume?

13 MR. BODNER: A lot of it's coffee. It's a lot of
14 things, but the point of the total consistency, not
15 irreconcilability between Blanford and Stacy is because of
16 the apples and oranges or razer razer blade, if you will,
17 which I'll explain in a second.

18 The, again, the quote that they misquote is first
19 there's an analyst question that says, just to make sure I
20 understand, not the seasonality, but whether how much sales
21 actually might be pulled forward in a response to the spring
22 merchandising? I think on brewer sales it looked like the
23 MPD data, which is sort of some fancy consumer data that
24 analysts like to rely to get an incite as to whether -- what
25 demand is.

1 MPD data was running at about a plus 60 percent or
2 so rate. And I think your brewers sales in the quarter were
3 up over 80. So is that an order of magnitude just maybe of
4 the difference in terms, of the differential in terms of try
5 to compare this last year to this year? Does that extra
6 30 percent or so roughly account for a little bit of new
7 seasonal pattern because you're going to have some spring
8 merchandising? Asking about brewer sales. Brewer sales.
9 Her answer is, Michelle Stacy, there I think we will take
10 this together. I will start, start it and John Whoriskey,
11 who reports to her at the Keurig brewer unit, will
12 follow-up.

13 First of all, one of the things to be cautious
14 about is the MPD database does not reflect all of the
15 customers. In fact, several of our customers are not
16 included in that base so you can't really make those direct
17 comparisons from one base to the other. Talking about
18 brewer sales.

19 Then she says, and this is what they quote
20 misquote, we did not pull forward any sales at all, talking
21 about brewers. The general demand is what we see. We will
22 fill our customer's orders as they come in. And they were
23 not building any excessive inventories at retail.

24 What she's saying is that we're getting demand for
25 brewers from our retail customers. And when she says

1 inventory is not building at retail, meaning at their retail
2 customers, not at -- she's not even talking about Green
3 Mountain, she's talking about their customers, they are not
4 seeing a build of brewers at the retail customers. They are
5 just servicing the demand.

6 Why is that important? Because Green Mountain
7 publicly disclosed, everyone knew it, it's on a razor razor
8 blade model. You sell brewers out into the market the way
9 you put a razor out to the market because what you really
10 want to sell are the razor blades, the K-Cups.

11 So the fact that they have brewers, again, she's
12 talking about brewers, not manning inventory at their
13 customer's, meaning they are satisfying that demand, it
14 means there's going to be even more demand for K-Cups coming
15 down the pike because you get a brewer then when you go
16 through the initial packs of K-Cups you get you go out and
17 you start buying brewers or start buying K-Cups.

18 So what she's saying has nothing to do with
19 anything that has to do with K-Cup inventory in any way,
20 shape or form.

21 Now, the brewers are made in China. The brewers
22 are not manufactured at all by Keurig. They are, they are,
23 they are by -- they are made in China.

24 The capacity that Mr. Blanford is referring to in
25 Q1 is about K-Cup production. Not brewer production. So

1 first off Miss Stacy's quote, the heart of their case, has
2 nothing to do with K-Cup demand or capacity. In fact, it
3 shows that, boy, there's more demand coming down the pike
4 because look at the demand for our brewers.

5 What Mr. Blanford is talking about is not
6 production capacity to produce brewers. They don't make
7 brewers. It's production capacity for K-Cups.

8 THE COURT: Well, all right. So let me go to the
9 second question that was raised with Mr. Rosen, in
10 particular to fraudulent intent by the speaker. I mean I
11 appreciate the fact that you're, you're saying that she's
12 speaking about, about something totally different --

13 MR. BODNER: Totally different.

14 THE COURT: -- than what's going on with the
15 inventory control. But, but this was, this is a unique
16 question. And that is putting aside Mr. Blanford and Miss
17 Rathke is the speaker on behalf of the corporation burdened
18 with knowledge of everything that's going on with the
19 corporation or in the corporation for purposes of intent,
20 knowingly making a fraudulent statement?

21 MR. BODNER: No. I mean, Your Honor, I don't
22 think anybody can read Dynex as somehow creating a
23 collective scienter concept where you can have an empty head
24 clean heart speaker who has no idea -- that is charged with
25 knowledge down the organization.

1 THE COURT: So under your theory you looked at the
2 misstatement, you then looked to the speaker of the
3 misstatement, and what is in that speaker's mind becomes the
4 relevant issue and if the speaker doesn't know something
5 that's going on behind the scenes even though the speaker is
6 speaking on behalf, not of the speaker, but of the
7 corporation, that is not fraudulent?

8 MR. BODNER: Absolutely. And I looked at Dynex,
9 Your Honor. I mean if you look at the language of Dynex
10 what it first says is that a plaintiff must sufficiently
11 allege that an agent of the corporation committed a culpable
12 act with the requisite scienter and that the act and
13 accompanied mental state are attributable to the
14 corporation.

15 And then when you put that concept in the
16 securities law context, in Dynex the complaint failed.
17 Remember that's where the District Court denied the motion
18 to dismiss but granted interlocutory appeal to The Second
19 Circuit. And The Second Circuit reversed the denial of the
20 motion to dismiss in Dynex.

21 And the reason the complaint in Dynex failed was
22 because no strong -- there was no strong inference that it
23 plead because, and to quote the court at 197, someone who
24 scienter -- it failed because someone whose scienter is
25 imputable to the corporate defendant and who was responsible

1 for the statements made was at least reckless.

2 They didn't, they didn't establish that. So they
3 didn't establish an individual who was a defendant. And
4 Dynex is clear, you don't have to, it's preferred, easier,
5 you don't have to have a named defendant who is deemed to
6 have, you know, been responsible for the statement with the
7 guilty mind. It could be someone else.

8 THE COURT: Upon which someone relied to make a
9 determination as to whether to purchase stock.

10 MR. BODNER: Right. So, and so, you know, the
11 idea that plaintiffs are somehow trying to say this has some
12 broad collective scienter is just beside the point. And I
13 think you particularly can't get there, and Your Honor I
14 actually wrote a paper on this, and I won't bore you with
15 it, but after the Janus decision in terms of what it means
16 to have made or been responsible for making the statement
17 makes it very clear it's a very narrow concept of who can
18 make the statement on behalf of the corporation. And,
19 therefore, that person has to be, I think, married with,
20 under Dynex, with the scienter. They have to point to
21 somebody.

22 Now, what Dynex says is there could be some usual
23 situations where you actually don't identify even a specific
24 person that marries both responsibility for the statement
25 with scienter, but none the less get corporate scienter.

1 And they use as the example, for example, because, again,
2 you have to use some common sense in this world, is if, and
3 the example they use in Dynex is if General Motors made this
4 statement that we sold a million SUV's when in fact they
5 sold none, and they just bring a claim against the company,
6 and something that dramatic, to use their words, you know,
7 could be get your mind around that even identifying an
8 individual and there is corporate scienter, that is a far
9 throw by any stretch of the imagination here.

10 So on, on that issue it's just a dead ringer
11 there. Way overreading Dynex beyond I think what any Court
12 in the country let alone the Second Circuit the way they've
13 read Dynex.

14 And then just to quickly step through the
15 remaining points, Your Honor. My brother had said in the
16 beginning, well, how is it that you can have a 250 million
17 dollar increase in inventory in Q4 despite a 50 million
18 dollar miss. And I think Your Honor gets it and understood
19 it, but just to repeat it, there's not a one for one
20 correlation here by any stretch of the imagination. To be
21 sure if they are planning on some demand that didn't
22 materialize that could account for some of it. But a big
23 part, as they have said throughout, and as you recognize,
24 was building this cushion. You know, building inventory to
25 satisfy the continually increase year over year in demand.

1 So it's sort of false numbers. And it's, it's a
2 misuse and it's, it's a empiric use of numbers that just
3 doesn't really add up or make any sense.

4 And it's the same, it's exactly the same, and they
5 said this in their brief, we addressed in our opposition,
6 and they just avoided it, or we said it in our opening state
7 or in our opening brief, and in their opposition they
8 avoided it, it's this whole point about there's something
9 magical or illustrative of fraud because the average days to
10 sale over the course of the class period actually increased
11 and the turn over decreased. And he's saying and if they
12 were going off, if we were to constrain demand throughout
13 the class period that's utterly inconsistent with what we're
14 saying.

15 Well, there are a number of things wrong with
16 that. The first thing, that is not what, as we really, you
17 know, if I'm earning my money at all today, you know, and if
18 we did our job in our brief, that's not what was said here.
19 And we're very clear in the record that this Court
20 absolutely can look to in terms of the earning calls as to
21 what was said.

22 In Q1 Larry Blanford said we were capacity
23 constrained and we're building for the holiday season Q3 or
24 Q4 and Q1, for the holiday season, to not be caught short
25 and to build K-Cup capacity. He said that in 1. In Q2 he

1 said and we're getting there, we're getting there, we're
2 catching up. In Q3 he says for our short-term demand for
3 this holiday season that we were worried about in Q1 we feel
4 we're there, we feel that we've spent hundreds of millions
5 of dollars, we have the capacity, K-Cup capacity lines in
6 place and we're there.

7 Well, of course, if they are there and they are
8 building more K-Cup capacity they are accomplishing exactly
9 what they wanted to see. Their average days to sale are
10 increasing because their inventories are increasing just as
11 they disclosed every quarter they are increasing. And their
12 turn over is decreasing absolutely consistent with what they
13 have said.

14 So it's, it's, it's lost on me how somehow that
15 is, that is compelling evidence of fraud when, in fact, it's
16 quite the opposite. It's far more compelling evidence that
17 what happened during this quarter is exactly as I said
18 earlier in my argument. What they said they had done, what
19 they were doing, and what they were going to do was
20 perfectly consistent with what they said.

21 With 10B 5-1 plans he says that's an issue of
22 fact. Well, he disagrees with The Second Circuit in, in the
23 Fishbaum case, which we cite in our brief, it's the Liz
24 Clairborne case. It says, 10B 5 plans can be waived in the
25 scienter analysis. That's the Second Circuit.

1 So you are not leading yourself by any stretch of
2 the imagine into error when you're relying on the Liz
3 Claairborne case in The Second Circuit for looking to 10B 5
4 cases along with the plethora of other cases in this, in
5 this circuit that have looked at 10B 5-1 plans and have not
6 required either summary judgment or a trial in order to do
7 so.

8 Then, at the risk, and I think it's fair argument
9 of going beyond the pleadings, but I was challenged by
10 plaintiff's counsel, that we have not come forward with any
11 innocent reasons for why there would be any hiding of
12 inventory.

13 And putting aside everything else I've already
14 argued, where were the audits when they were unaudited
15 financial statements there is a certain real world aspect.
16 And for anyone who has ever worked in a factory, and I have,
17 I did make more than two dollars an hour, but not much more
18 than two dollars an hour. When you do an inventory count
19 you're trying in a dynamic environment, especially something
20 as dynamic as Green Mountain in the four billion K-Cups,
21 when you are doing a count you are trying to do a static
22 exercise in a dynamic environment.

23 And you, you need to try to not have deliveries
24 coming in while you're doing a count or have orders going
25 out either to be destroyed or to be sold, or whatever, in

1 order to make the count. But life is not perfect,
2 particularly when you are dealing with four billion K-Cups.

3 And there are times when deliveries will be held
4 at the door or cordoned off because we need to bring down
5 the curtain to make a count in this dynamic environment. Or
6 something has already been recorded for destruction, but it
7 hasn't been destroyed yet, well, you can't count that
8 because you'd be miscounting because it's already recorded
9 for destruction.

10 So there are plenty of innocent reasons why things
11 may be cordoned off if it even happened, but as to why that
12 would happened that's why you need to have confidential
13 witnesses to satisfy Novak who know what -- there's a
14 probability they know what they are talking about. The
15 quality, with all due respect, the low quality of the CW
16 allegations here do not pass muster.

17 And with that Your Honor, unless you have any
18 other questions?

19 THE COURT: No, I think that's it.

20 Mr. Byrne, do you need --

21 MR. BYRNE: I have one quick point to make.

22 THE COURT: Okay.

23 MR. BYRNE: There was a brief discussion of the
24 core operations doctrine. And I think the best way to make
25 my point is to refer you back to your own opinion that

1 talked about the core operations doctrine and scienter in
2 the Dynex opinion. And what this Court has already said is
3 that the difficulties that the core operations doctrine does
4 not dispose of the general requirement that plaintiffs
5 allege facts available to defendants that would have
6 illuminated the falsities.

7 And I think it's very clear, especially given the
8 concessions that were made in oral argument, that there is
9 no specific identification of conversations or documents
10 that would have alerted the individual defendants to any of
11 the alleged improprieties. That's all I have. Thank you.

12 THE COURT: All right.

13 MR. ROSEN: Two minutes, Your Honor.

14 THE COURT: Yes.

15 MR. ROSEN: Maybe three if I try and slow down so
16 I don't burn the court reporter.

17 THE COURT: Okay.

18 MR. ROSEN: In terms of statements about the level
19 of inventory he said we told this quarter and that quarter
20 what the number was. Implicit in each of those statements
21 is that the company is selling inventory at the rate it's
22 being produced. It was not.

23 Mr. Bodner talked about the razors and the razor
24 blade analogy. And on that issue, the short answer on that
25 if you are not selling brewers you won't be selling K-Cups.

1 So if there's a problem with the brewer sales that's
2 obviously implicated for the sale of K-Cups.

3 In terms of the knowledge of the corporate
4 spokesman, the best analogy I have for Your Honor is
5 political. And that's back to the days of Kennedy and
6 Pierre Salinger when Pierre Salinger was getting ready to
7 brief the press, I don't know if it was some Cuban missile
8 crisis or something else and he said, don't tell me the
9 facts, I don't want to be accused of lying to the press.

10 And, you know, if it were a corporate situation
11 Pierre Salinger goes and says, speaks for Kennedy, Inc. and
12 McNamara or Kennedy knows the facts and Pierre Salinger
13 knows nothing except how to spin it then I would
14 respectfully suggest you could have corporate scienter.

15 THE COURT: Well, does anyone go to Pierre
16 Salinger and say you have an obligation not only to, to
17 speak the truth, but then to go and conduct your own
18 investigation throughout a corporation that has 23 different
19 facilities to make sure that what you're saying is the
20 absolute truth?

21 MR. ROSEN: Respectfully, Your Honor, I would flip
22 it around saying the people who are in the know have an
23 obligation not to have a person go out and speak at an
24 investor's conference call saying something they know is not
25 true.

1 Finally, Mr. Bodner, next to finally,
2 Mr. Bodner --

3 THE COURT: That they just know is not true. And,
4 and, but --

5 MR. ROSEN: All right.

6 THE COURT: Go ahead.

7 MR. ROSEN: Mr. Bodner talked about Janus which is
8 a Supreme Court case dealing with who can be liable in 10B.
9 The defendants in the Bank of America case cited that to
10 Judge Pauley when they moved for reconsideration. And in
11 that case it took four motions to get past the motions to
12 dismiss.

13 In the first motion to dismiss Judge Pauley
14 sustained the claim against Bank of America, dismissed all
15 the individual defendants. Bank of America represented by
16 very competent counsel moved for reconsideration citing the
17 Janus case.

18 And I would be glad to send Your Honor's clerk the
19 citation to that. And what Judge Paulie said is the Janus
20 case doesn't change that. You can still have corporate
21 scienter and Janus doesn't change that.

22 Finally, Mr. Bodner was talking about the
23 inventory turn over ratio and the average days to sell
24 inventory. Those are in Paragraph 52 and 53 of our
25 complaint, Pages 18 and 19. And in that we show each

1 quarter, each of the four quarters for 2010 and 2011 the
2 changes. And in each quarter we show significant decreases
3 in the ratio for the inventory turn over ratio and
4 significant increases in the average days to sell inventory.
5 So in each of those quarters the trend existed. It wasn't
6 simply the final quarter.

7 Finally --

8 THE COURT: And were those disclosed during,
9 during and during --

10 MR. ROSEN: Those were not disclosed. Someone had
11 to go into the, into the public knowledge and take that
12 apart and do an analysis.

13 And the, there's something called, there is no
14 obligation for investors do complicated analysis, to hire a
15 C.P.A. to do complicated analysis of the company's
16 financials to say I suspect the company is lying to me when
17 they are saying we're not building up excess inventory, and
18 I'll go hire a C.P.A. to do, a forensic C.P.A. to look at
19 the inventory turn over ratio or the average days to sell.

20 So I would respectfully submit, Your Honor, and
21 this is my last comment, that for each of the quarters that
22 the data was inconsistent with the representation.

23 With that I thank Your Honor very much for your
24 patience and your attention. You're obviously very well
25 prepared and I appreciate your hospitality.

1 THE COURT: I appreciate it very much.

2 MR. BODNER: Thank you, Your Honor.

3 (The Court recessed at 4:10 p.m.)

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C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

A handwritten signature in cursive script that reads "Anne Marie Henry". The signature is written in black ink and is positioned above a horizontal line.

Anne Marie Henry, RPR
Official Court Reporter